PRACTICE

UNDER

THE JUDICATURE ACTS;

BEING

REPORTS OF POINTS OF PRACTICE

ARISING UNDER

THE JUDICATURE ACTS, 1873 and 1875,

DECIDED IN JUDGES' CHAMBERS.

EDITED BY

ADAM H. BITTLESTON, B.A., S.C.L.,

Of the Inner Temple, Barrister-at-Law.

LONDON:
LAW TIMES OFFICE, 10, WELLINGTON-STREET, STRAND, W.C

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ADDENDA.

THE following notices have been posted in Judges' Chambers since Nov. 1, in addition to No. XXVIII. in the Reports.

PENDING BUSINESS.

HIGH COURT OF JUSTICE.—NOTICE.

In order to save the expense and inconvenience of separate applications for directions as to the form and manner of procedure in actions commenced before the 1st Nov. inst., the Judge sitting at chambers hereby directs—1. That where no declaration has been delivered the action shall be continued according to the ordinary course of the High Court of Justice, as if it had been commenced in that court. 2. That in all other cases the action shall be continued up to the close of the pleadings according to the practice of the court in which it was brought, and afterwards according to the provisions of the Judicature Acts, subject, however, to an order, at the instance of either party, to proceed at any stage according to the course prescribed by those Acts.

Judge's Chambers, Nov. 2, 1875. (By order.)

COSTS OF INSPECTION.

Where an order for the inspection of documents is made under Order XXXI., rules 17 and 18, the costs of the application and of the inspection shall be costs in the cause (unless otherwise ordered), the cost of 4*d.* per folio for copies of documents being paid by the party inspecting.

(By order of the Sitting Judge.)

December 20, 1875.

JUDGES' CHAMBERS.

Nov. 2 *and* 5.

(Before LUSH, J.)

RAMSDEN *v.* BREARLEY.

Interrogatories—Discovery—Action for libel—Judicature Act 1873, *s.* 24; *s.* 22, *sub-s.* 7—6 *&* 7 *Will.* 4, *c.* 76, *s.* 19.

Any information which, before the passing of the Judicature Acts, could have been obtained in Equity by filing a bill of discovery, can now be obtained by interrogatories in any cause before the High Court of Justice, although the cause may have been entered for trial before the Judicature Acts came into operation.

THIS was an action by the plaintiff against the publisher of the *Standard* newspaper, for an alleged libel in that paper; and the present application to his Lordship was for leave to administer interrogatories to the defendant. The interrogatory which was objected to, and which, as will be seen, was allowed by the learned Judge, is as follows:—Were you, on the 22nd Nov. 1874, the printer or publisher, or both, of the *Standard* newspaper?

W. P. Macdonald appeared for the plaintiff; *Warburton Pike* for the defendant.

Nov. 5.—LUSH, J.—The question in this case is whether the plaintiff is entitled to an order for administering interrogatories to the defendant for the purpose of discovering whether he was or was not, at a given date, the printer and publisher of the *Standard* newspaper. The action, which is for an alleged libel in that paper, was brought many months ago, and was entered for trial at the sittings after last Trinity Term, but not having been reached, it stands in the list of remanets for trial at the present sittings. The defendant's plea is "Not Guilty." Whether the plaintiff could have obtained permission to put this interrogatory from the Court of Queen's Bench, under the law as it stood up to the 1st Nov. inst., is at least doubtful. She was advised that she could not, and she did not therefore make the application. But she clearly had the right to a discovery in equity by virtue of 6 & 7 Will. 4, c. 76, s. 19, which is still in force (see 32 & 33 Vict. c. 24), and which enacts, "That if any person shall file any bill in any court for discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matter relating to the printing or publishing of any newspaper,

in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compelled to make the discovery required; provided always that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in the proceeding for which the discovery was made." The plaintiff did not avail herself of the remedy thus provided, by reason, as she alleges, of her inability to bear the expense of it. It must be taken, upon the statement made to me, that she has a difficulty in proving the fact that the defendant was the printer and publisher, and that the discovery sought will enable her "more effectually" to carry on her action. The questions are, first, the general one—Can a plaintiff in an action brought in the High Court of Justice have the benefit of this enactment by any form of proceeding in the division to which the action belongs; and, second, if it could be granted in such an action, can it and ought it to be applied to an action brought and entered for trial before the Judicature Acts came into operation? I cannot entertain a doubt upon either of these questions. As to the first, the Court of Chancery no longer exists as a separate tribunal. It has become a constituent part of the High Court of Justice, each division of which is invested with equal authority and with the entire jurisdiction of the whole court. The 24th section of the Act of 1873 was designed to meet such cases as this. It enacts in sub-sect. 7: "That the High Court of Justice, in any cause or matter pending before it, shall have power to grant and shall grant all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim, properly brought forward by them respectively in such cause or matter, so that as far as possible all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." The proceeding by bill of discovery, pointed out by the Act of Will. 4, has also been abolished; but the Judicature Acts were not intended to abolish, nor have they the effect of abolishing the right of discovery which it gives. That right still exists. The procedure substituted by the Acts for the bill of discovery is an action in the High Court; but that, by the hypothesis, has been already brought. By the express language of the section just quoted, the remedy is to be granted as a proceeding in that action, and in order to carry out the policy of the Act, it must be granted by that Division of the High Court which has seisin of the cause, so as to "avoid multiplicity of legal proceedings." To hold that the suitor must go elsewhere for it would be to defeat the primary objects of the

Acts. I am, therefore, of opinion that in the case supposed a plaintiff would be entitled to the discovery now sought, and that the appropriate form of remedy is by administering interrogatories. The protection accorded to the defendant by the Act of Will. 4 will attach to the answer which he makes to this interrogatory, as it would have attached to the answer to the bill of discovery. The second point is provided for by the 22nd section of the Act of 1873. By that section the High Court is to have "the same jurisdiction in relation to pending actions as if the same had been originally commenced therein," and it goes on to say that, "so far as regards the form and manner of procedure, such causes may be continued and concluded either in the same or the like manner as they would have been continued and concluded in the court from which they shall have been transferred, or according to the ordinary course of the High Court of Justice (so far as the same may be applicable thereto), as the Court may think fit to direct." It is clear that if the Judicature Acts had not passed the plaintiff might now have filed a bill of discovery, and no reason has been suggested why she should be deprived of the substituted remedy here. The defendant will not be in a worse position by being required to answer the interrogatory than he would have been if such a bill had been filed. I therefore direct that this action be continued according to the course of the High Court of Justice, and allow the interrogatory. As the trial may come on at the latter end of the next week, and as the question is one which will require no time, and will put the defendant to no inconvenience to answer, I must require him to file his answer on or before Monday next.

Solicitor for the plaintiff, *A. Howard.*

Solicitor for the defendant, *Riches.*

ERRATA.

No. XI.; *insert* after, (See No. XIX.)

No. XVI.; *insert*, after the words "deliver milk" in line 3, comma.

No. XIX.; *insert*, after the words "defendant's affidavit" in line 3, "(See No. XI.)"

No. XXI.; in lines 1 and 3 of judgment *for* "plaintiff" *read* "defendant," and in line 2 *for* "defendant" *read* "plaintiff."

No. XXVII.; in head-note *for* "18" *read* "12," and *for* "inspection" *read* "discovery," and in line 1 *for* "inspection" *read* "discovery."

No. XXVIII.; in last line *omit* the words "copy of the," and after last word *add* "with the notice (Appendix B, Form 4)."

No. XXX.; in head-note *for* "18" *read* "16."

No. XXXII.; in head-note *for* "inspection" *read* "discovery."

No. XXXVIII.; in head-note *for* "34" *read* "36."

No. XLV.; in line 1 of judgment after "H. *v.* M" *insert* "(10 H. L. C. 191; 33 L. J. 193, Ch.)," in line 5 of judgment *insert* "not" between "was" and "entitled," and in lines 10 and last of judgment *for* "claimant" *read* "execution creditor."

No. XLVI.; in line 8, *for* "lien" *read* "him."

No. LIII.; in line 2 of judgment *for* "abolish" *read* "encourage."

No. LX.; in head-note, between "Court" and "30," *insert* "Order VI rules."

No. LXXV.; in head-note *for* "interrogatories" *read* "discovery," and *for* "1" *read* "12."

No. LXXIX.; in head-note and line 3 *for* "XXVI." *read* "XXXI.," and *for* "12" *read* "4."

No. CXXVII.; in head-note *for* "1875" *read* "1873."

No. CXXX.; in line 1 and line 1 of judgment, *for* "Moncton" *read* "Moulton," in line 2 of judgment *for* "8" *read* "6."

No. CXXXVII.; in line 1 *for* "1879" *read* "1875."

No. CXLVII.; in line 2 *for* "pp. 87, 105," *read* "p. 46."

No. CLXXXIV.; *insert* in head-note after "XXXI.," "rule 12."

Errata.

No. CXCVI.; in head-note *for* "31" *read* "35, s. 24, snb-s. 5."

No. CCXVI.; in 2nd line of judgment *for* "filing" *read* "framing."

No. CCXXI.; in head-note *for* "6" *read* "14, 18," and *for* "XIII." *read* "XVI."

No. CCXXXI.; in line 6 *for* "Moncton" *read* "Moulton."

No. CCXXXII.; in line 6 *for* "defendant" *read* "plaintiff."

No. CCXXXIII.; in line 3 *for* "Moncton" *read* "Moulton," and to head-note *add* "snb-s. 8."

No. CCXLIX.; in line 2 *omit* the words "debtor and a judgment."

No. CCLXXV.; in line 17 *for* "Foord" *read* "Foard."

No. CCLXXVIII.; in line 14, *for* "defendant" *read* "plaintiff."

J. L. M.
7/2/33

Reports of Practice Cases.

JUDGES' CHAMBERS (a).

Friday, Nov. 5.

(Before LUSH, J.)

No. I.

Application for leave to deliver declaration.

THIS was an application for leave to deliver a declaration which had been drawn some time previous to the 1st Nov., but for various reasons not delivered before that day. The action was one of demurrage on two charter-parties.

LUSH, J.—The declaration should have been delivered before. It is extremely desirable on all accounts to bring the new Act into operation as soon as possible. This is a matter of considerable length, the statement of which will, by the new Rules, have to be printed. I cannot make this an exception to the order, that after 1st Nov. no declaration should be delivered.

No. II.

Amendment of indorsement on writ.

AN application was made to the Judge as to whether his order was necessary in order to amend the indorsement of a writ not yet served. The indorsement on a writ under the Judicature Act may, in certain cases, be treated as the statement of claim. The Judge directed the applicant to take an order.

No. III.

Order XXXI., rule 12, *Judicature Act* 1875.

UNDER the above rule an order will not be given, as of course, but a summons must be taken out.

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

No. IV.

ATKINSON *v.* ELLISON AND ANOTHER.

After delivery of declaration, new procedure ordered to be adopted, on affidavit of counter claim.

THIS was an action brought to recover rent under a deed of underlease. The declaration was delivered before the 1st Nov. Subsequently a summons was taken out by the defendants calling upon the plaintiff to show cause why all matters in dispute should not be referred to arbitrators named in the deed, and why all further proceedings in the cause, if any, should not be continued and concluded according to the ordinary course of the High Court of Justice.

Bowen appeared to support the summons, and *F. Turner* showed cause.

The first part of the summons as to referring matters in dispute being decided against him, *Bowen* handed in an affidavit stating that the defendant had a cross claim with regard to the breach of covenant in the lease, and urged that, under the Judicature Act, this could be set-off against the claim of the plaintiff.

LUSH, J.—The affidavit does not state the counter-claim very clearly, but I shall direct that the action shall be continued according to the ordinary course of the High Court of Justice.

F. Turner.—Will the declaration have to be amended, and made a statement of claim?

LUSH, J.—The declaration may stand as a statement.

Solicitors for the plaintiff, *Walters, Young,* and *Co.*

Solicitor for the defendants, *F. T. Dubois.*

No. V.

CAMPBELL AND ANOTHER *v.* IM THURN AND OTHERS.

Order XVI., rule 3, *Judicature Act* 1875.

The trustee appointed to distribute composition among creditors of acceptors of a bill of exchange will not be joined as a party in an action by the indorsee against the acceptors.

THIS was an action by the plaintiffs as indorsees against defendants as acceptors of a bill of exchange, under the Bill of Exchange Act, leave having been given to the defendants to appear. The declaration was delivered on 1st Nov. A summons was taken out by the defendants for the purpose of having the proceedings carried on under the new Act.

Holl appeared to support the summons. He first applied that, under Order XVI., rule 3 of the Judicature Act 1875, Mr. J. Young should be joined as a defendant in the action. Messrs. J. C. im Thurn and Co. having suspended payment, and their creditors having agreed to accept a composition, Mr. J. Young was appointed trustee. The bill upon which the action

was brought was for £1373 3s. 11d., and was drawn for account of Messrs. Cloetta and Schwarz. On the failure of J. C. im Thurn and Co., two bills for £600 and £786 19s. were sent as cover by Messrs. Cloetta and Schwartz, to the holders of the bill, Finlay, Campbell, and Co. The bill for £786 19s. was duly paid at maturity, but the bill for £600 was dishonoured. Cloetta and Schwarz have now also failed. The plaintiff refuses to take the composition and Young refuses to pay more.

LUSH, J.—The plaintiff could not sue Young, and Young has no interest in the suit. There is no privity between them.

Holl read the opinion of Mr. Benjamin, Q.C., recommending an application to be made for an order for the joinder of the trustee as defendant.

LUSH, J.—I can make no order that the trustee should be joined as a defendant. There is a clause in the Judicature Act that says that the procedure under the Bills of Exchange Act shall be unaltered. I doubt whether that applies to the procedure after the declaration is delivered. I shall not, however, decide that now; all further proceedings in the cause may be continued and concluded according to the ordinary course of the High Court of Justice.

No. VI.

Transfer—Order LI., rule 1—*Judicature Act* 1875.

IN an action upon an agreement to take a house, which was said to be an offshoot of an administration suit now pending, an application was made for the case to be sent over to the Chancery division, to be tried conjointly with the administration suit. His Lordship said that he had no power to make the order, as the Lord Chancellor alone could give permission for the transfer.

No. VII.

Renewal of writ—Order VIII., rule 1, *Judicature Act* 1875.

APPLICATION having been made to the officer to renew a writ issued in 1874, and duly renewed at intervals of six months, he declined to renew it without an order from the judge.

LUSH, J.—My impression is that that writ will never require an order for its renewal. The rule applies only to writs issued under the Act.

Saturday, Nov. 6.

No. VIII.

Service out of the jurisdiction—Order XI., rules 1, 3.

THIS was an application for leave to serve a writ upon a defendant in Scotland, supported by an affidavit.

LUSH, J.—You don't show either that the contract was made in London, or that it was broken in London. Order XI., Rule 1, of

the Act says nothing about place of performance. You must amend your affidavit; you had better shew where the parties signed the contract.

No. IX.

Interrogatories—Order XXXI., rule 1.

A SUMMONS had been taken out under the new Act, after the close of the pleadings, calling upon defendant to answer interrogatories. Issue was joined before 1st Nov.

LUSH, J.—Where it is sought to administer interrogatories after the pleadings are at an end, the practice under the new system does not differ from that under the old. As at present advised, I should require an affidavit.

No. X.

Restraining action—Judicature Act 1873, *s.* 24, *sub-sect.* 5.

AN application having been made to the Master of the Rolls to make an order to refer for taxation the costs in a suit, and in the meantime to restrain a common law action now pending, he said that he would make the order to refer, but had now no power to stay proceedings at common law. An application was now made for an order to stay proceedings in the action. It was stated that the courts of equity under the old system always restrained proceedings at law on granting an order to refer for taxation of costs.

LUSH, J.—It seems to me that whatever division of the court makes the order, that division should restrain the action. This order, as I understand it, is not an injunction within the meaning of the Act. It is part of the order to tax. Another application can be made to the Master of the Rolls, and if he still declines, I will consider the case again.

No. XI.

Counter claim after issue joined—Judicature Act 1875—*Order XIX., rule* 3.

THIS was an application to add a counter claim to pleadings after issue joined. The action was one for goods sold and delivered, and the defence was one of fraud as to the nature of the goods. No cross action had been commenced; the defendant had not returned the goods; and there had been part payment. Consequently, the defendant apprehended a difficulty in setting up prompt repudiation at the trial, and therefore desired to add a counter claim under Order XIX., rule 3 of the new Act.

LUSH, J.—If the allegation is well founded, there is in this case ground for a counter claim. I will adjourn the case for defendant's affidavit.

See N. VIV

No. XII.

Milissich *v.* Lloyd's.

Separate issues to be tried separately—Judicature Act 1875—*Order XXXVI., rule* 6.

This was a summons taken out by the defendants calling upon the plaintiff to show cause why all further proceedings in the action should not be according to the New Procedure, and why all further proceedings under the order for the commission should not be stayed until after the trial of the issues arising upon the pleas of Not guilty and justification, the defendants submitting to any order the court might make as to assessment of damages.

Mathew appeared to support the summons; *J. M'Leod* showed cause.

The action was one for libel relating to policies of insurance, and the facts were as follows:—Vouchers were laid before the underwriters at Lloyd's by a man named Guerra, in which the sum of 140*l.* had been substituted for that of 28*l.* Guerra was prosecuted and convicted. At the trial of Guerra the prosecuting counsel stated that the plaintiff Milissich and another person named Ghitaberti had conspired with the prisoner to commit the fraud. A report of the trial was printed and circulated in the form of a pamphlet by Lloyd's, and that report contained the charge above alluded to, which was the alleged libel. The defendant pleaded Not guilty, and justification. An order had been obtained by the plaintiff for a commission to issue for the examination of certain persons at Venice.

Mathew.—The interrogatories are simply directed to character. The ground of my application is that the question of damages stands apart from the question of fact, and that the new rule, therefore, applies. Let us ascertain whether there is a libel at all, before we go into the question of damages. The interrogatories seem to be directed simply to the question whether certain persons had not known and dealt with the plaintiff, and whether they had not ceased to deal with him in consequence of the pamphlet containing the libel.

M'Leod.—It would be very hard on Milissich if the evidence was confined to what could be procured in this country, as there might then be a strong case against him. The interrogatories are not confined to the question of damages, their object being also to prove the fact of publication in Venice.

Lush, J.—I must see that the plaintiff is not prejudiced by having this isolated fact tried. Subject to that and to my seeing the interrogatories, I should be inclined to grant the order. Send me the interrogatories and I will decide on Monday.

Nov. 8.—Lush, J.—I cannot make the order. I do not think that I could in this case separate the question of damages from the question of fact without injury to the plaintiff.

Monday, Nov. 8.

No. XIII.

Special case—Judicature Act 1875, *Order XXXIV., rule* 2.

THIS was an application for a special case to be stated under the above order. The action was one of trover against the South-Western Railway Company. Goods in packing cases were sent to Wooley *viâ* the South-Western Railway; when they arrived at Twickenham, where consignee lived, he was unable to pay the charges, and the company kept the cases. It was stated in defendant's affidavit that the consignee on being told that the goods were at the station, said that he couldn't take them at present, but it was of no consequence, as they contained pieces of marble. The plaintiff's case was that the goods were stopped *in transitu* without notice to the consignee. The defendant's case was that immediately on the goods arriving at Twickenham notice was given to the consignee.

LUSH, J.—It must go to a jury. If there was any doubtful point of law, the case would be different. You dispute the time when the goods arrived, and their value. The legal liability depends on facts that must be tried before a jury.

No. XIV.

Withdrawing record—Re-entering—Order XXIII., Judicature Act 1875.

AN application was made for an order to withdraw the record in an action for breach of promise of marriage. It was stated that the parties reside in Ireland, and that negotiations were going on for a settlement. The cause stands for trial on Wednesday.

LUSH, J.—The intention of this provision is that you should not be at liberty to withdraw the record, and to re-enter it without leave. I will give the order, but it is not to be re-entered without leave.

No. XV.

Power to direct trials before referees—Judicature Act 1873, *sect.* 57.

THIS was an application for an order to refer the cause in question to a special referee. The action was one of negligence brought by trustees against their solicitors. The trustees had been allowed by the defendants to advance their money on mortgage of a property, which the defendants reported favourably on in 1869. In 1870 the property produced no rent, and the trustees took it into their own hands. Sixteen breaches were alleged, such as not following counsel's opinion, &c. The particulars of claim include

the gross amount advanced, interest on that amount, and various items of expenditure on the property. An objection was taken that there was no power to make the order unless the defendants admitted their liability, and reference was made to the Act of 1875, sect. 22.

LUSH, J.—That is only a modified restoration of the Bill of Exceptions; but it does not touch the reference clause at all.

It was then urged on behalf of the plaintiffs that the case was just coming on for trial; and on the other side it was pointed out that the Act had only just come into force, and could not before have been taken advantage of.

LUSH, J.—I should under any circumstances feel a difficulty in interfering when a cause is on the point of being tried. But my power is limited by the Act to making the order asked for in causes where "any prolonged examination of documents or accounts, or any scientific or local investigation" is required; and here the question of accounts is quite a subordinate one, and with regard to prolonged examination of documents I can make no order.

No. XVI.

Interrogatories—Judicature Act 1875, *Order XXXI., Rule* 5.

THIS was a summons to strike out interrogatories delivered by the plaintiffs under the Act, and therefore without an order, in an action upon a contract to deliver milk to the defendants in that action. The breach alleged in the declaration was non-delivery; and there was a second count alleging that the milk supplied was of inferior quality to that contracted for. The interrogatories chiefly objected to were as follows: Who skimmed the milk that was supplied to us? Was it habitually or occasionally done? &c.

LUSH, J.—I feel it is quite necessary to keep a strong hand on the interrogatories now. I was very much afraid that the power given by the Act would be abused, and this is an abuse. The interrogatories will be disallowed; and the costs are to be the defendants' in any event.

Tuesday, Nov. 9.

No. XVII.

Judicature Act 1875, *Order XXXI., rule* 12.

AN application was made to the Judge under the above rule for an order for discovery of documents. The declaration had been delivered before 1st Nov.

LUSH, J.—The old practice is to go on until the close of the pleadings in actions begun before the Act came into operation. An affidavit is, therefore, necessary in this case. No order.

No. XVIII.

Application to proceed under the Judicature Act.

In this case the declaration had been delivered before 1st Nov. The action was upon an agreement, which was set out in the declaration, and breach alleged; there were also the usual money counts. The plaintiffs had a claim under the agreement for £20 against the defendants. The defendants' case was that they were agents, and they desired to proceed under the Act, as they would then be able to make their principal a defendant in the action. It appeared that it was doubtful whether there was any contract in writing at all.

Lush, J.—I will grant your application. You can serve a statement of defence, instead of pleas, but I do not at present say that you can make your principal a party in the action. (*a*)

No. XIX.

Evans *v.* Gan.

In the case of *Evans* v. *Gan*, which was an application to add a counter-claim to the pleadings after the cause was at issue, and which was adjourned on Saturday for defendant's affidavit, the affidavit was produced.

Lush, J.—This action is for goods sold and delivered, and it is clearly one of the cases contemplated by the Act. Fraudulent representation as to the nature of goods sold is ground for an action, but if you keep the goods, it is no defence to an action for their value. The effect of my granting this application will be to consolidate the two actions, and I therefore grant it. The costs of this application and the costs of amendment of pleadings must be the plaintiff's in any event.

Wednesday, Nov. 10.

No. XX.

Signing judgment in actions of ejectment.

An *ex parte* application having been made yesterday to his Lordship, questioning the correctness of the decision of the Masters in the Exchequer, that they could not, under the Act, sign judgment in actions of ejectment, after due service of writ and default of appearance, without an order, he postponed his decision until to-day for the purpose of consulting with the masters, intimating at the same time that he thought an order would be necessary. This morning his Lordship gave the following decision: The

(*a*) His Lordship has stated that in cases similar to the above, an order will not be given, but simply a direction how to proceed.

service of a writ in the manner prescribed by Order IX., rule 8, will not entitle the plaintiff in an action of ejectment to sign judgment without an order; rule 112 of Hilary Term 1853 remains in force.

No. XXI.

Hall *v.* Smith.

Judicature Act 1875, *Order LVIII., rule* 10.—*Enlarging time for appeal from refusal of rule.*

This was an action for damages by a builder against a clergyman for not allowing him to finish a building, in which a verdict was given for the plaintiff for 120*l.* A rule for a new trial on the ground of misdirection had been moved for and refused. Application was now made to the learned judge under the above rule to enlarge the four days within which such refusal should be appealed against. The ground of the application was that the Court of Appeal were not yet prepared to hear appeals of this nature; and it was said that they propose to make a rule establishing one day a week for these motions.

Lush, J.—The ~~plaintiff~~ defendant says he is willing to pay the money into court; I will, therefore, stay the ~~defendant's~~ plaintiff's hand for a fortnight to enable the ~~plaintiff~~ defendant to appeal, if he pays into court this week 240*l.*

No. XXII.

Injunction.

An application was made for an injunction to restrain from paying away money.

Lush, J.—I shall follow the Chancery practice, and grant it without an affidavit.

No. XXIII.

Declarations delivered on 1*st Nov.*

An application was made to the judge under these circumstances: Two declarations had been delivered on Nov. 1st; subsequently, in one case, directions were given to proceed under the Act; in the other directions were given to proceed under the old system.

Lush, J.—You might have come for a direction, if you were in doubt as to whether to deliver declarations or statements of claim. If you had read the Act you would have seen that pending actions might have been continued, either according to the old or the new practice, as the court might direct. I shall not alter the directions that have been given.

No. XXIV.

Luscher v. Comptoir d'Escompte de Paris.

Injunction—Judicature Act 1873, *s.* 25, *sub-sect.* 8; *Judicature Act* 1875, *Order LII., rules* 2, 3, 4.

This was an action by Luscher & Co., merchants, against the Comptoir d'Escompte de Paris for money paid. The present was

an *ex parte* application under the above provisions of the Act, for money to be paid into court, pending a summons calling upon the other party to show cause why an injunction should not be issued restraining the defendants from paying away money in their hands, which the plaintiffs claimed. The plaintiffs were the consignees of 428 bales of palm leaves; the bill of lading being in the hands of the defendants, the plaintiffs, who were entitled to it, claimed it from them. The consignor, however, had become bankrupt, and the defendants claimed the bill of lading on behalf of the Bank of Algiers, and refused to give it up until the plaintiffs paid the sum of £538 4*s.* 2*d.* Finally, the plaintiffs paid what they demanded under protest; and it was to recover this sum that the action was brought.

Bremner supported the application.

LUSH, J.—I cannot order the holder of the money to pay it into court unless he wishes to. Some person has wrongfully withheld your bill of lading, and you have a claim against him for the money you have paid. It is not your money, though you have a claim against them; and I have no power to direct them what to do with their money. No order.

Wednesday, Nov. 10.

No. XXV.

TWYCROFT *v.* GRANT AND OTHERS.

THIS was an application to continue the action according to the ordinary course of the High Court of Justice.

Bremner, in supporting the application, stated that this was an action brought against Baron Grant and two other defendants, named Clark and Punshard, for issuing a fraudulent prospectus. The reason for the application was that several orders had been obtained, calling upon Grant to answer these interrogatories, but he had taken no notice of any of them. If this application were granted, the plaintiff would be able to avail himself of the provision for striking out the defence on failure to answer interrogatories, instead of proceeding by the old and often ineffectual system of attachment.

Webster for the defendant Grant, stated that the reason that the interrogatories had not been yet answered was that Mr. Morris, Baron Grant's solicitor, went to America in reference to the Erie railway, and has not yet come back. We are willing to give them answers within a week.

LUSH, J.—Then I shall not give the direction asked for. If I had done so, I should only have struck out the defence in the last resort.

No. XXVI.

Judicature Act 1875, *Order XXXI., rule* 4.

AN application was made as to whether an order was necessary for interrogatories against a body corporate.

LUSH, J.—An order is necessary.

Thursday, Nov. 11.

No. XXVII.

MATTOCK *v.* HEATH.

Judicature Act 1875—*Order XXXI., rule* 1. ~~*Inspection*~~ Discovery *of documents.*

THIS was an application under the Act for an order for ~~inspection~~ discovery of documents, and a cross summons had been taken out by the other side for the same purpose. The action was one of ejectment, and the matter was originally in the Court of Chancery. The defendant claimed to be heir-at-law to an estate of which the last owner, Mr. Scarth, died intestate, as being his cousin. Malins, V.C., had dismissed the plaintiff's bill, and left him to bring his action of ejectment at common law. The defendant was in possession. The documents asked for were certain pedigrees, and letters between the defendant and intestate.

Finlay for the plaintiff.—Letters that have passed between the defendant and intestate admitting, as defendant alleges, the relationship between them, are relied upon by the defendant, and therefore we are entitled to see them. We say that if we see them we shall be able to prove that he was no relation at all.

Lord, contra.—My friend's case is that the intestate's name was Scarf, and not Scarth. The action was ripe for trial at the sittings after last Trinity Term, and the record was withdrawn by plaintiff, who has seen everything we have.

Finlay.—In defendant's bill of costs he admits having pedigrees.

LUSH, J.—Here it is alleged that you have seen both the letters and the pedigrees; I will adjourn till to-morrow to enable you to get an affidavit.

Friday, Nov. 12.

No. XXVII.

MATTOCK *v.* HEATH.

On the adjourned summons coming on

Finlay, for the plaintiff, put in an affidavit, which stated that it appeared from the bill of costs that the defendant has in his possession notes taken by Mr. Roe of statements made by the defendant relating to the descent of the family. Those notes are the

documents of which we desire discovery, and I submit that, at all events under the Act, we are entitled to an order.

LUSH, J.—Does the Act give wider powers of discovery than were in existence previously? It certainly dispenses with an affidavit, but that only in the discretion of the Judge. You are not entitled to discovery except of documents that you would have a *primâ facie* right to inspect. This is a mere memorandum made by or on behalf of the defendant. Can you claim to see private memoranda written by the opposite party for his pleasure or convenience? The plaintiff and the defendant do not claim here from a common ancestor; but are at issue upon the question who was the father of the intestate.

Finlay.—It may be a most material element in the plaintiff's case that the defendant has at different times made different statements with regard to the nature of his relationship.

LUSH, J.—I can make no order. Both summonses dismissed with costs.

No. XXVIII.

Judicature Act 1875. *Order XXX., rule* 2.

THE following order was to-day issued:—

As money may now be paid into court without leave at any time after service of the writ, and before defence (Order XXX., rule 2), summonses to stay on payment of a smaller sum than the sum demanded will no longer be issued. Instead, thereof, the amount shall be paid into court, and ~~the copy of~~ the receipt sent to the plaintiff's solicitor with the notice (Appendix B, Form 4).

By order of the Sitting Judge.

Chambers.

No. XXIX.

ATKINSON *v.* ELLISON.

Judicature Act 1873, *ss.* 56, 57—*Summons to refer—Common Law Procedure Act* 1854, *s.* 11.

THIS case, in which a previous summons was heard last week (No. 4), came again before the Judge on a summons taken out by the defendant to refer the original claim and the counter-claim in the action to an arbitrator named in the lease.

Bowen in support of the summons—I ask that the landlord's claim for rent, and the tenant's claim for breach of covenant, may both be referred. The nature of our cross-claim is that under the covenant by the landlord to do certain repairs we have a right to be repaid for those repairs which we were compelled to do by threats from the superior landlord. The declaration was delivered before Nov. 1, but the action has been ordered by your Lordship to be continued under the Act. Pleas have not yet been delivered. It seems to be a question for a surveyor rather than a jury.

LUSH, J.—A surveyor could go down and see the premises, and give his evidence before a jury.

Bowen.—I make this application first under sects. 56, 57, of the Judicature Act 1873, and secondly under sect. 11 of the Common Law Procedure Act 1854, which would enable me to take advantage of the clause to refer.

F. Turner, contra.—If the defendant is entitled to anything under the Common Law Procedure Act, it can only be to refer the question as to the covenant in the lease, as that only is covered by the reference clause; he would not be entitled to refer the action for rent.

Bowen.—We could refer the question whether the counter-claim is good *pro tanto*.

LUSH, J.—The defendant is not the person sued as regards the counter-claim, and the Common Law Procedure Act only gives the benefit of setting up an arbitration clause to the person sued. The counter claims comes in under the new Act. As to that the defendant cannot avail himself of the Common Law Procedure Act, and I do not think this is a case for reference under the Judicature Act. I give him time to plead in case he likes to take the opinion of the court. Costs to be costs in the cause.

No. XXX.

Judicature Act 1873, *s.* 16.

A JUDGE in Chambers has now the same jurisdiction as the Master of the Rolls to stay writs of prohibition issuing from the Petty Bag Office.

No. XXXI.

Discovery—Judicature Act 1875—*Order XXXI., rule* 12.

AN order for discovery of documents under the Act, includes documents that have been in the power of the opposite party; under the old system, the order related only to documents then in his possession or power, and interrogatories were necessary with regard to any that had ceased to be so.

No. XXXII.

Judicature Act 1875—*Order XXXI., rule* 20—*Failure to give inspection.* discovery.

THIS was an appeal from a decision of one of the masters, refusing to dismiss an action for want of prosecution. An order for discovery had been made on 2nd Nov., directing the plaintiff to file his affidavit in four days; subsequently, two days more were given him, but he had failed to comply with the order. The present summons was then taken out. On the other side it was said that they were now ready to comply with the order.

LUSH, J.—I have not yet granted an application of this kind; nor shall I do so when the parties really intend to answer. This is a highly penal provision, and only to be exercised in the last

resort. With regard to the costs of this summons, I should have been inclined to make them the defendant's in any event; but, as the master has decided that they should be costs in the cause, and it is the principle of the Act that costs should not be the subject of an appeal, I shall make no order.

No. XXXIII.

Judicature Act 1875.—*Order L., rr.* 1, 2, 3, 4.

THIS was an application by a trustee under a bankruptcy that he should not be required to give security for costs in an action carried on by him in the bankrupt's name, and was based upon the above rules. The matter had been before a master, who had refused the application. It was now urged that, under Order L., rule 4, the trustee's name could be inserted instead of the bankrupt's as plaintiff in the action.

LUSH, J.—Rule 4, Order L., gives me power to insert the trustee's name; but the cause is set down for trial, and I think it would be very inconvenient to alter the record. If the proceedings had not reached their present stage, it would have been desirable to have done so; as it is, it seems to me not desirable. It is better that the old practice of the trustee's giving security for costs should be followed in this case. Supposing the plaintiff's name to remain, it rests upon a principle of law, independent of statutes, that where an action is brought by one person for the benefit of another, and the person so suing is a bankrupt, the person for whose benefit the action is brought must give security for costs. As the cause is at issue, future proceedings will be carried on under the Judicature Acts; but what I am asked to do is to change all that was done under the old system. It can make no material difference to the trustee whether his name appears as plaintiff in the record, and he thus becomes liable for costs, or whether he gives security for costs.

Saturday, Nov. 13.

No. XXXIV.

Judicature Act 1875—*Order III., r.* 6.—*Particulars.*

THIS was an appeal from Master Gordon's decision refusing to make an order for particulars. This was an action of debt for goods supplied. Judgment had been signed, but afterwards set aside upon affidavit of merits. The writ was not specially indorsed.

LUSH, J.—I hope it will be generally understood that in money causes particulars will not be ordered or allowed as a matter of course. When they can be indorsed or stated in the claim they ought to be so, and the expenses of a second document saved.

The action having been ordered to go on under the Act, a statement of claim had been delivered, setting out the goods for the price of which the action was brought, and which consisted of the various items of a fancy dress in an air-tight case, but not giving the separate price of each item. These were the particulars defendant asked for. For plaintiff it was said that, as he was not himself a maker of the articles he had sold to defendant, but had ordered them from another person, he could not give the particulars asked for.

LUSH, J.—I will adjourn till Tuesday for the best particulars the plaintiff can give.

No. XXXV.

Judicature Act 1875. *Order XXXVI., rule* 13.—*Postponement of notice of trial.*

THIS was an application by the plaintiff in an action for postponement of trial. The question in the action related to the condition of a cargo of rye. The cause stood for trial in February last, but at that time defendants obtained a postponement in order to enable a commission to go on their behalf to Galatz, which commission had just returned. The reason for the present application was that the boatswain of the ship in which the cargo was shipped, who was a necessary witness for the plaintiff, and who in February was at Sunderland, and ready to come up to London, had gone to sea again two days ago. Under the late procedure no application would have been necessary, as the plaintiff might have withdrawn the record, but now an application to postpone must be made. It was stated that the boatswain would not be back till March as he had gone to Mexico.

LUSH, J.—It is the plaintiff's delay, not the defendant's; I will postpone till March.

No. XXXVI.

Service of writ—Judicature Act 1875, *Order IX., rule* 2.

THIS was an appeal from a refusal of a master to make an order to proceed in the absence of service.

LUSH, J.—The master is quite right. Under the Act an order for substituted service is necessary.

No. XXXVII.

Judicature Act 1875, *Order* XI., *rule* 1—*Service out of the jurisdiction.*

THIS was an appeal from a decision of Master Manley Smith that an affidavit produced was insufficient under the above rule to enable him to make an order for service of a writ out of the jurisdiction. The affidavit stated that the cause of action arose within the jurisdiction, and that it was for money paid by plaintiff

for defendant, and interest thereon, and that the defendant was bound to indemnify the plaintiff.

LUSH.—The general affidavit that the cause of action arose within the jurisdiction is not now sufficient; what is requisite is pointed out by the rule. Amend your affidavit by stating that the money was paid in London.

No. XXXVIII.

Judicature Act 1873, *sect.* 3[illegible]—*Removal of cause.*

AN application was made that a cause which had been tried before Pollock, B., at Liverpool, and in which a rule *nisi* had been granted two terms ago by the Court of Exchequer, should be sent over to the Common Pleas Division. It was stated that Mr. Aspinall had advised this application.

LUSH, J.—The application should be made to the Exchequer Division of the High Court; I can make no order.

No. XXXIX.

Application to proceed under the Judicature Acts.

THIS was an appeal from a decision of Master Johnson, refusing an application for proceedings to be continued under the Act. The action was one for the breach of a covenant in a lease of a furnished house. The declaration, which was delivered on the 1st Nov., contained all the facts that would have been necessary for a statement of claim; and the defendant thought he was entitled to the benefit of the Act, and wished to be at liberty to deliver a statement of defence instead of pleas.

LUSH, J.—I think under the circumstances I ought to give the direction you ask for. The declaration is to be amended by entitling it in the High Court of Justice, and it may then stand as a statement of claim. The statement of defence to be delivered on Thursday.

No. XL.

SKINNER *v.* DODDS.

Order to refer—Judicature Act 1873, *sect.* 57.

THIS was an action for £5250, for the services of the plaintiff and four clerks, in doing the business of defendants, who were underwriters. The defence was practically that there had been sufficient payment. An order had been obtained before the Act came into operation to refer to a master, and application was now made by the defendant to vary this order by substituting for a master a special or an official referee. The ground of the application was that from the master there was no appeal on questions of law; from the referees there would be a general appeal to the court as to law and facts, by sect. 57 of the Act of 1873.

No order. Costs to be plaintiff's in any event.

Compton for the plaintiff.

Harrison for the defendant.

No. XLI.

Blewitt *v.* Dowling.

Injunction—Judicature Act 1873, *s.* 24, *sub-s.* 5; *s.* 25, *sub-s.* 8.

This was an action of ejectment, in which an injunction was obtained last week. Notice of trial had been given by B. J. Blewitt, the plaintiff, for the sittings in London, and the defendant had appeared and defended for the whole of the land.

A. Charles for the defendant.—The plaintiff has issued three writs for the recovery of land against three tenants of the defendant's, and threatens forty-seven more. I appear on behalf of the landlord, who is the defendant in this action, to ask your Lordship to stay these three actions at once. I am appearing *ex parte* on this occasion; but I think that is contemplated by sect. 24, sub-sect. 5, of the Act of 1873, upon which I am proceeding.

Lush, J.—The section says: "By motion in a summary way," but that does not mean *ex parte*. I think you must proceed by summons; sect. 25, sub-sect. 8, requires one.

A. Charles.—Could not your Lordship extend the time of appearance? If we give them notice, they will issue the forty-seven writs before they can be restrained.

Lush, J.—I think I have no power to interfere at all on an *ex parte* application.

A. Charles.—I am informed that this application would have been undoubtedy *ex parte* in Chancery, and that the other side could come afterwards and try to reverse the order.

Lush, J.—I will adjourn the application for you to inquire of one of the registrars whether that is so.

Later in the afternoon the above application was renewed.

A. Charles.—I have seen Mr. Registrar Latham, and he says that the Vice-Chancellors, and generally the parties themselves, prefer that applications for injunctions to restrain should be after notice to the other side; as that course avoided the possible inconvenience of having the order subsequently set aside, if the party interested made out a valid objection to it. But he said that, beyond all question, the Court of Chancery would restrain actions against tenants subsidiary to an action of ejectment, in a case of this kind, on an *ex parte* application.

Lush, J.—Then I will make the order. You want an *interim* injunction till Wednesday, and then a permanent one.

Monday, Nov. 15.

No. XLII.

LIVERPOOL, BRAZIL, RIVER PLATE STEAM NAVIGATION COMPANY *v.* LONDON AND ST. KATHERINE STEAM NAVIGATION COMPANY.

Separate issues to be tried separately—Judicature Act 1875, *Order XXXVI., rule* 6—*Judicature Act* 1873, *sect.* 57.

THIS was an appeal from an order of a master that the question of liability arising in this action should be tried separately from the question of damages. It was an action for injuries done to a vessel of the plaintiff company while in the dock of the defendant company. For the appellant, it was urged that if the question of liability was tried by a jury and found against the dock company, and then the damages had to be assessed in a separate inquiry, it would materially increase the expense; that the case was a simple one; and that the amount of the damages ought to be fixed by a jury. On the other side it was said that it was useless to go to court with two sets of witnesses, one to prove the defendants' liability, and the other to prove the damage to the vessel, when the Judge would be certain to refer the question of damages; that the alleged damage consisted of a variety of items; that the object of the rule was that a question of extent of damage of a complicated character should be tried apart; and that, under sect. 57 of the Act of 1873, the Judge would have power to order a reference, without the consent of the opposite party, if he considered any prolonged examination of accounts requisite.

LUSH, J.—I cannot help thinking that a reference would be ordered by the Judge as to the question of accounts. I do not think it was intended by the Act that a question as to damages of this sort should be tried in court.

Order of master affirmed.

No. XLIII.

MEASURES *v.* THOMAS AND JONES.

Judicature Act 1875, *Order XVI., rules* 18, 19, 20, 21.

THIS was an action for the price of ironwork, and the defendants had given notice to Smaley, a third party, under the above rules, that they claimed to be indemnified by him. A question arose as to the plaintiff's *locus standi* in the present matter, and it was stated that he desired to appear as Smaley was a man of straw.

LUSH, J.—That will make no difference to you; the present defendant will not in any way be released from his liability to the plaintiff.

It appeared that Smaley had contracted to build a warehouse, and defendants were to find the ironwork, Smaley paying them 80 per cent. net cash for it. Notice was given by the defendants under Order XVI, rule 18; and the present appearance was under Order XVI., rule 21. The defendants admitted their liability to the plaintiff, and the only question was whether Smaley should indemnify them to the extent of 80 per cent., or to the full amount. A tender of the smaller sum had already been made by Smaley to the defendants. The defendants desired that such an order should be made as would estop Smaley from disputing the amount that, at the trial, the defendants should be held liable to pay the plaintiff.

Lush, J.—That is exactly the object of the rule. Upon an affidavit of service and non-attendance of Smaley, I order that Smaley, if liable, do not dispute the amount due to the plaintiff from the defendants. Then Smaley is bound when he brings his action of indemnity by the amount paid to the plaintiff. In the event of Smaley being held liable to indemnify the defendants, the costs of this summons to be the defendants'.

No. XLIV.

Hough *v.* The Ocean Marine Insurance Company.

Summons to refer—Judicature Act 1873, *sect.* 57.

This was a claim of a large sum of money from underwriters for particular average. The nature of the defence was that, when the ship was repaired at Malta, a quantity of unnecessary repairs were done. The defendants paid 1000*l.* into court, and took out the present summons to refer under the Act. They put in an affidavit stating that it would be necessary to go into a prolonged examination of accounts as to the repairs done to the vessel. On the other side it was urged that the cause was coming on for trial; that there would be no question of items; that all the repairs done to the vessel were necessary in consequence of the injuries she had sustained; and that, if the matter was to be referred, the plaintiff would much rather wait till the trial, by which time probably official referees would have been appointed, who would sit *de die in diem*, instead of having constant adjournments.

Lush, J.—I shall leave it to the judge at the trial, who will have the facts more fully before him.

Tuesday, Nov. 16.

No. XLV.

Interpleader summons—Ante-nuptial settlement of after-acquired property.

On the hearing of an interpleader summons, an important question was raised as to whether after-acquired property could vest

under the trusts of an ante-nuptial settlement. Under the trusts of a marriage settlement all household goods, &c., were assigned to the wife, and all after-acquired property of a similar kind were to be subject to the same trusts.

LUSH, J.—In *Holroyd* v. *Marshall*, the House of Lords decided in a case similar to this that all the after-acquired property came under the trusts of the deed, reversing the decision of the Lords Justices. Before the Judicature Act I should have been bound to hold that the claimant was entitled to the goods brought in since the settlement; but an application might then have been made to a court of equity, who would have restrained the sheriff from interfering with them. I am now bound to administer equity, and must, therefore, follow the decision in *Holroyd* v. *Marshall*. It is open to the claimant to appeal upon this question, which is a very important one. I question the policy of the law in this respect. It seems to me a very mischievous thing to allow all after-acquired property to vest under a marriage settlement. With regard to the objection that the marriage settlement was not registered, the Bills of Sale Act does not require it. The sheriff must withdraw; claimant barred.

No. XLVI.

Judicature Act 1875, *Order XVI., rules* 4, 13—*Striking out a party to an action.*

THIS was an action by a builder for work and labour done. A writ was issued against two persons, who occupied the position of lessor and lessee, and the present application was on behalf of Christy, the lessor, to have his name struck out of the action. It was stated that Shoots, the other defendant, was liable to do all the repairs as lessee, and that Christy had no interest in the action. On behalf of plaintiff it was stated that there was a question as to which was liable to them, so he had served both parties.

LUSH, J.—I cannot try that question here. The defendant Christy has misunderstood the meaning of the rules.

Dismissed with costs.

No. XLVII.

AMIS *v.* CLARK.

Judicature Act 1873, *ss*, 40, 45—*County Courts Act, s.* 6—*Appeal from County Court.*

AN *ex parte* application was made to the Judge with regard to appealing under the Act from a County Court. The Act of 1873, sect. 45, transfers such appeals to a divisional court to be constituted for the purpose; but the defendant's last day of appeal had come, and no divisional court had been constituted for hearing such appeals. Formerly, such an appeal would have been to a

Vice-Chancellor, but that was taken away by the Act. It had been decided by the Lords Justices that an appeal after the Act came into operation from a decision given before that time was governed by the Act. It was stated on behalf of the defendant that he had given notice of appeal, but was not now proceeding by summons; he contended that what he desired was similar to an injunction which his Lordship had already granted *ex parte*. It appeared that the County Court judge had decreed specific performance of a contract to convey; the grounds of appeal were that the person who entered into the contract on defendant's behalf was not his agent. The purchase money was 160*l*.

LUSH, J.—Has the money been paid to your agent? I must protect the plaintiff. I will adjourn the application for you to find out.

On renewing the adjourned application it was stated that Clark, the defendant, had always denied the authority of Bridge to sell for him, so Amis, the plaintiff, had not paid the purchase-money.

LUSH, J.—Then I will make an order that on motion *ex parte* by the defendant I allow the defendant liberty to appeal to the proper divisional court, when constituted.

No. XLVIII.

TEBBS *v.* LEWIS AND ANOTHER.

Judicature Act 1875—*Order XVI., rules* 17, 18.—*Notice to third parties.*

THIS was an action against auctioneers by an intending vendee for his deposit money. Under the above rules a notice had been served upon Green, the vendor, who claimed the deposit money as forfeit. The amount of the deposit money was £247; but out of this £81 2s. 6d. was claimed by the defendants as commission.

It was contended by *W. A. Lewis* for the defendants that in this case they were not stakeholders, but agents for the vendors. They were unable to interplead as they claimed part of the sum, and had an interest in the validity of the sale being established.

Beasley, for the plaintiff, objected that the declaration was delivered on 26th Oct., and that, therefore, they were under the old practice.

LUSH, J.—The plaintiff will not be hurt, as the money is to be paid into court; and the defendants will be relieved from having another action possibly brought against them. This is one of the very cases contemplated by the Act. I direct that this action be continued according to the ordinary course of the High Court of Justice; that the vendor Green come in as a party to be bound by the verdict. Costs of the application to be plaintiff's costs in the cause.

No. XLIX.

Interpleader.

In an interpleader summons a question arose as to whether the practice in writs of *fi. fa.*, where there was a partnership account was the same at common law and equity. The common law rule has been that where there was a partnership account the sheriff could not interplead; but his Lordship doubted whether that rule prevailed in equity, and whether the partnership account would not have to be gone into to see the state of accounts between the partners; in which case that practice must now be followed in all cases. It was stated by the sheriff's representative that the practice in this respect had always been the same in equity and common law.

Ultimately, it was settled that the old practice was unaltered, and the sheriff withdrew.

No. L.

Judicature Act 1875, *Order XXXI., rule* 20. — *Summons to strike out defence in default of discovery.*

This was an action for breach of an agreement to allow the plaintiffs to use certain waste lands for the purpose of draining docks belonging to them. An order for discovery of documents had been made on the 14th July, and not complied with; the plaintiffs now asked to strike out the defence. On the other side it was stated that differences had arisen between the real and the nominal defendants, that the same solicitor had previously been acting for both parties, and that a change had consequently become necessary; and that it was owing to this that the delay had occurred.

Lush, J.—Then I give you a week more.

Wednesday, Nov. 17.

No. LI.

Green's Trustee *v.* Barrett.—Barrett *v.* Rosenthal.

Judicature Act, 1873, *sect.* 57—*Summons to refer.*

One Green having become bankrupt, the trustee under the bankruptcy, who is the plaintiff in the first, and the defendant in the second action, took possession of the premises. Barrett, the landlord, claimed a right to distrain on part of the machinery thereon, and eventually did distrain. The present summons was to refer under the above section. Two cross actions, the first brought by the trustee for wrongful distress; the second by the landlord for rent, breach of covenant to repair, and some small amounts under various heads.

M'Leod, for the landlord, in support of the summons, contended that a prolonged investigation of documents was necessary, as there were over 140 pages of correspondence between the parties as to their respective rights; that a local investigation was necessary as to the non-repair of machinery by the trustee, which was the real question in the second action, and that the damages occasioned by non-repair must ultimately form the subject of a reference.

Williams, for the trustee, stated that the second action had only just been begun, whereas the first stood for trial; and that the landlord having agreed that if the goods were left on the premises he would not distrain, the sole question in the first action would be as to a breach of this agreement.

Lush, J.—Reading a lot of letters is not what the Act means by a prolonged examination of documents; and there is no more necessity for a local investigation in this case than in any action for non-repair. I can make no order.

No. LII.

Hancock and others *v.* De Niceville.

Summons to strike out Replication.

This was an appeal from a Master's decision allowing a replication. The action was for goods sold; pleas, never indebted, and coverture. The replication stated that the defendant in her own proper person had promised to pay, and thereby charged her separate estate; and further that she was living apart from her husband, and therefore her separate estate was liable.

Kelly, for the defendant, urged that the action was brought on a common law claim, that the plaintiffs had chosen to stand upon their rights at common law, and not in equity, that the declaration was delivered on the 25th Oct., and that therefore they were under the old system.

Williams, on the other side, cited cases to prove that it was a good equitable ground of reply.

Lush, J.—It is unnecessary to decide whether the plaintiff could avail himself of his equitable rights in this action, and at this stage of it, as the replication does not state that the defendant had any separate estate, and is therefore bad from any point of view. It would embarrass the defendant, and I cannot allow it. Decision of Master reversed.

No. LIII.

Discovery.

In an action of ejectment, a summons had been taken out for discovery. The nature of the documents of which discovery was sought was not known.

LUSH, J.—Then I certainly shall not make the order. The Act did not intend to ~~abolish~~ these speculative summonses by doing away with the affidavit.

Thursday, Nov. 18.

No. LIV.

Printing—Judicature Act 1875, *Order XIX., rule* 5.

AN affidavit, though more than three folios, may, by order of the judge, be filed without printing; and, *semble*, will be so when only a few copies are required.

No. LV.

Judicature Act 1875—*Application to proceed under the Acts, Order XIX., rule* 3—*Judicature Act* 1873, *sect.* 22.

THIS was an appeal from a decision of Master Johnson. The action was brought for the price of goods sold; and the ground of the application was that the defendant desired to set up a counter-claim. The declaration had been delivered on the 28th Oct. The master was of opinion that the affidavit did not disclose sufficient grounds for a cross action. The affidavit of the defendant stated that when the ship arrived conveying the goods in question, which consisted of machinery, they were found to be materially damaged, owing to bad packing; and further that when the machinery came to be worked, it broke in various places, owing to the bad quality of the iron used.

LUSH, J.—The affidavit of the defendant shows a good cause of action, and wherever there is *bonâ fide* ground for a cross action, I direct the new procedure to be adopted. It has the effect of converting two actions into one; and that cases of this sort should be brought under the new system is one of the very objects of sect. 22 of the Act of 1873. The decision of the master must be reversed, and the direction asked for given.

No. LVI.

Judicature Act 1873, *s.* 22—*Application to proceed under the Acts.*

IN this case the declaration had been delivered on the 25th Oct., and the pleas were not yet delivered. The ground of the application was that the defendant desired to take out a summons to refer under the Act.—Direction as asked.

No. LVII.

Judicature Act 1875, *Order XXXI., rule* 12—*Summons for discovery.*

THIS was a summons for discovery in an action for libel. The alleged libel was a charge of violent conduct by a landlady con-

tained in some letters to the *Grimsby News*. The discovery sought was of the original letters containing the alleged libel. On the affidavit being held to be insufficient, it was contended by the plaintiff that, as the pleadings were complete, he was entitled under the Judicature Act to an order without any affidavit.

LUSH, J.—The new rule certainly goes far beyond the old; as it not only dispenses with an affidavit, but would require the defendant, if he has not got the letters, to state what he has done with them. I will adjourn, to enable the other side to bring an affidavit.

No. LVIII.

SCARTH *v.* WILLIAMS.

Judicature Act 1875, *Order XXXI, rule* 20—*Summons to dismiss action for want of prosecution.*

THIS was a feigned issue directed by the Master of the Rolls to try the question whether there was an agreement between the parties that the plaintiff, who was the administrator of his brother, a solicitor, should only charge the defendant costs out of pocket. The alleged date of the agreement was 10th Dec. 1866. On the 28th ult. an order had been made upon the plaintiff for discovery of documents; this not having been complied with, on the 12th inst., a peremptory order was made by Master Manley Smith, calling upon the plaintiffs to answer by the following day. On the 13th inst. that order was postponed by Blackburn, J., and the following day an affidavit of documents was filed by the plaintiff. The present summons was then taken out by the defendant on the ground that in this affidavit there was no mention of any document in the suit of *Shoolbred* v. *Williams*, which lasted from August 1866, down to 1872, and which was the most important suit in the business of Francis Scarth, deceased, although the plaintiff had made an affidavit in Chancery that he had documents in that suit. These facts were stated in an affidavit which was put in. On the other side it was stated that they had set out in the affidavit every letter which they had ever had from the deceasd, Scarth.

LUSH, J.—How do the documents in *Shoolbred* v. *Williams* relate to the matter now in question? In truth the defendant does not know whether they do or not till he sees them. There is a specific agreement alleged here, and these letters cannot be material.—No order.

No. LIX.

THOMAS *v.* THE QUEEN.

Application to proceed under the Acts—Counter claim—Judicature Act 1873, *s.* 22—*Judicature Act* 1875, *Order XIX., rule* 3.

THIS was a petition of right, commenced in June 1873. By the Petition of Right Act 1860, the procedure in petitions of right is to be similar to that in actions at law. The claim in the petition was

for a sum of money alleged to be due from the Crown to the plaintiff in pursuance of an agreement to reward the plaintiff for certain improvements in artillery invented by him. The long interval since the cause was commenced had been caused by the plaintiff's amendment of his petition, and some delay in obtaining the Solicitor-General's fiat to the amendment.

Bowen, for the Crown, now desired to avail himself of the new procedure, and set up a counter claim for expenses in connection with experiments. As the petition had been amended, he was entitled to plead *de novo*. He had an affidavit made by the Accountant-General of the Army that the counter claim was a *bonâ fide* one.

Lanyon, for the plaintiff, thought that it would be hard if the defendant was now allowed to avail himself of the new procedure, when, but for an accident, the cause would have been tried before the Acts came into operation. He was willing, if necessary, to withdraw the amendment of his petition, and he could bring an affidavit showing that the delay was caused by the other side.

LUSH, J.—It is just if there is a counter claim that the Crown should be able to set it up; and what is just ought to be done. If it is fit and proper that this counter claim should be set up in any proceedings, why should it not be set up in the pending proceedings? I do not know what I should do if issue had been joined; that case has not yet come before me. I direct that the petition be continued according to the ordinary course of the High Court of Justice. If the petitioner is successful in establishing his claim, but your counter-claim is also established, and for a larger amount, it should be in the discretion of the court whether the petitioner should not have the costs of the trial up to the time of the introduction of the counter-claim.

No. LX.

Order VI

Judicature Act 1875—*Additional Rules of Court*, 30, 31, 32—*Appeal from taxation of costs.*

ON an appeal coming before the judge from a taxation of costs by the Master, a preliminary objection was taken that the Master's allocatur had been given, and was final and conclusive as to all matters that had not been objected to before the Master in the manner prescribed by the above rules. In reply, it was submitted that the whole of the proceedings in the cause had been previous to the Act coming into operation.

LUSH, J.—There are provisions in the new Acts that must apply to pending business, and this is one of them. With all the disposition to help you, I am afraid I have no power to do so.

Appeal dismissed.

No. LXI.

Summons to strike out interrogatories—Judicature Act 1875, *Order XXXI., rule* 5.

THIS was an application to strike out interrogatories that had been delivered under the Acts without an order, in an action for penalties brought under the 102nd section of the Larceny Act, by a common informer. The object of the interrogatories was to discover whether the defendant had inserted a certain advertisement in a newspaper. The interrogatories were delivered on the 12th; and an objection taken that this summons was too late was overruled.

H. Cowie for the defendant.—Discovery is never given in equity in an action by a common informer. The old doctrine of equity on this subject is laid down in *Orm* v. *Crockford* (13 Price, 308), which was an action for penalties under 9 Anne, c. 16, in the Court of Exchequer, sitting as an equity court, and where it is laid down that it is "contrary to the humane policy of the law" to allow discovery where it would subject the answering party to penalties. *Chadwick* v. *Chadwick* (22 L. J. Ch.), and *Edmunds* v. *Greenwood* (L. Rep. 10 C. P. 222) are also in point. In all works on discovery in equity it is laid down that where discovery will subject the answering party to a penalty, it has not been allowed where the object of the plaintiff is to recover the penalty,

LUSH, J.—I foresee that we shall have more trouble with interrogatories now that no order is necessary, than we had before.

Interrogatories ordered to be struck out.

Friday, Nov. 19.

No. LXII.

HEWETSON *v.* THE WHITTINGTON LIFE INSURANCE SOCIETY.

Interrogatories against a company—Judicature Act 1875, *Order XXXI., rule* 4, *s.* 5.

THIS was an application for an order to deliver interrogatories to the officer of the defendant company in an action on a policy. Upon an objection to the interrogatories on behalf of the defendant, it was contended for the plaintiff that the nature of the interrogatories could not be gone into on the present summons, but that another summons must be taken out under the 5th rule of the 31st order, for an order to strike them out.

LUSH, J.—Wherever under the new practice an order for interrogatories is necessary, the interrogatories will be gone into on the application for the order, and it will not be granted as of course. These interrogatories may be unnecessary after plea.

Summons adjourned till after plea.

No. LXIII.

UNDER the Judicature Acts, an appeal is in all cases a re-hearing, and fresh facts may be gone into.—Per LUSH, J.

No. LXIV.

Judicature Act 1875, *Order IX., rule* 2.—*Substituted service.*

THIS was an *ex parte* appeal from a decision of Master Bennett's refusing to make an order for substituted service. The affidavit stated that on the 24th Aug. S. was inquired for at his Club and could not be found; on the 1st. Sept. plaintiff wrote to Baker, defendant's solicitor, asking for S.'s address; to that an answer came saying that he would be happy to forward letters to S. A few days afterwards, plaintiff wrote to Baker that the reason S.'s address was wanted was because he owed them £450. On the 25th Oct. plaintiff wrote again to Baker, complaining of having had no answer, and asking whether he was prepared to accept service. On the 28th Oct. Baker replied to the effect that having no instructions, he could not accept service. On this, plaintiff wrote to know whether Baker was not S.'s solicitor, and on the 3rd Nov. Baker wrote to say that he had acted for S. but was not now acting for him. On the 9th Nov. plaintiff attended at S.'s club and asked for his address, and was told that he had not been there for some time, and that his address was unknown there. On the 13th Nov., on calling again at the club, the plaintiff was told that Baker called for S.'s letters. It was stated that Morgan's Rules for Substituted Service, and other books on equity practice lay down that service on an agent is sufficient, provided he is closely connected with the party.

LUSH, J.—Your affidavit does not state when Baker called for S.'s letters, or how often. If he was in the habit of calling for them, I think that would be sufficient. You must amend your affidavit.

No. LXV.

NORTON CANNOCK COAL COMPANY *v.* MERRIMAN.

Application for direction to proceed under Judicature Acts—Counter-claim.

THIS was an action for the price of coals sold and delivered, £198 odd.

Grant for defendant.—I have not pleaded yet, and I desire to set up a counter-claim of non-delivery of the balance of the coals. They only sue us for the amount they have delivered.

Moulton for plaintiff.—The declaration was delivered on 25th Oct. I desire to put them to their cross action.

LUSH, J.—The Act has decided that cross actions shall be tried simultaneously.

Direction given.

Saturday, Nov. 20.

No. LXVI.

TENNANT *v.* WALTON.

Application to proceed under the Judicature Act or to refer—Counter claim.

THIS was an action on attorney's bills, amounting to 80*l.* The declaration was delivered on the 30th Oct.

Cooper, for the defendant.—The defendant is an auctioneer. We have a considerable set-off to that claim, and also a counter claim for negligence in doing our business. We do not deny the retainer. The set-off makes a reference desirable.

Mayd, for the plaintiff.—The counter claim the defendant desires to set up is one for acting negligently in a cause in which the amount in dispute was only 12*l.*, and which was tried in the County Court at Salford as long ago as 1871. Till our bills were sent in in 1875, no complaint of any negligence was made.

LUSH, J.—The principle upon which I have hitherto acted is that wherever, in pending business, there is a *bonâ fide* cross claim, I direct the action to be continued according to the ordinary course of the High Court of Justice. Here I do not think there is any substance in your counter claim or your set-off; and, with regard to the set-off, it could be pleaded. I shall make no direction to continue this action under the Judicature Acts, nor to refer under the Common Law Procedure Act.

No. LXVII.

Application to proceed under the Act—Counter claim.

THIS was an action for the price of shares by a stockbroker, and it was desired to set up a counter claim for fraudulent representation as to the value of the shares. Adjourned for an affidavit; upon defendant producing affidavit of counter claim new procedure to be adopted.

No. LXVIII.

Application to proceed under the Act—Counter claim.

THIS was an action brought for the price of iron sold and delivered. The defendant desired to set up a counter claim for non-compliance with the contract in respect of the quality of the iron supplied. The declaration was delivered 27th Oct. It was alleged that the iron had been passed on to third parties for chain cables, and that the defendant had had to make good damage sustained in consequence of the inferiority of the iron supplied.

LUSH, J.—Where the counter claim is *bonâ fide*, these applications are granted as a matter of course.

Direction given.

No. LXIX.

TRINACRIA STEAM NAVIGATION COMPANY *v.* RICHARDSON.

Summons to proceed under the Act.

THIS was an action by a foreign corporation for damages for the negligent construction of a ship, Sicily being the domicile of the plaintiffs. The ground of the present application was that the defendant desired to set up a counter claim for extras due to him beyond the contract price which the plaintiffs had paid.

Anstie, for defendant.—An action was commenced before the Judicature Acts came into operation for the cross claim, and we served a writ in the manner prescribed by Sicilian law in July last. There being a difficulty as to whether this was good service, and a question whether a foreign corporation domiciled abroad could be served at all, Field, J., was applied to, and he expressed a strong opinion that the company should accept service of writ in the cross action, and finally adjourned the summons to see what effect the Judicature Acts might have upon the question.

Webster, for the plaintiffs, cited cases to show that a foreign corporation cannot be sued. The Judicature Acts have not altered the law on this point, and the defendant should not be allowed to adopt the new procedure for the mere purpose of setting up a counter-claim where he could not bring a cross action.

LUSH, J.—It is a matter of course that this direction should be given where there is a *bonâ fide* counter-claim, and I think that *à fortiori* it should be given where there is a difficulty in serving the writ in a cross action founded on the counter-claim.

Direction given.

Monday, Nov. 22.

No. LXX.

Particulars of counter claim.

THIS was a summons for particulars of a counter claim on appeal from the Master's decision that the particulars in the claim were sufficient. The action was brought for goods sold and delivered. The defendants agreed to purchase certain coal of the plaintiff, and the plaintiff accordingly shipped the coals. The defendants had obtained leave to serve a counter claim, and the plaintiffs desired particulars of damages under the breaches alleged in the ninth paragraph, the counter claim set up being for breach of contract. On behalf of the defendants it was said that the counter claim contained sufficient particulars, as it alleged the amount delivered short, and claimed demurrage.

LUSH, J.—You have not given any particulars as to inferior quality. You say in your claim that the cargo contained a large

quantity of stones, &c. I order that you give particulars of the damages claimed, except in respect of short delivery and demurrage. Costs to be costs in the cause.

No. LXXI.

Interrogatories.

INTERROGATORIES in an action under the old procedure, that had been delivered without an order, were struck out.

No. LXXII.

Order XXII., rule 5.

AN application was made *ex parte* by the defendants in an action in which a counter claim was set up as to whether, under the following circumstances he should add to the title of his statement of defence the name of a third person. They were brokers, and had purchased iron from plaintiffs to sell to a third party. The action was for the price of the iron, aud the counter claim for certain deductions the defendant had had to allow the third party, owing to inferior quality of the iron. The above rule does not apply to such a case, so as to make it necessary to add the third party's name to the title.

No. LXXIII.

BARROW *v.* COOKE.

Statement of claim in the place of declaration.

THIS was an appeal from an order of Master Johnson of the 17th Nov., calling upon the plaintiff to deliver a statement of claim in the place of his declaration. The declaration was delivered on the 2nd Nov., having been drawn by counsel during the Long Vacation, and alleged that the plaintiff employed the defendant for reward to dispose of certain shares, but that the defendant did not deliver a true and just account; another count alleged that the defendant so fraudulently conducted himself towards the plaintiff that the shares became of no value.

Cooper Wyld for the defendant.

LUSH, J.—How can his giving a false account of the sale affect the shares? In those cases where I have allowed a declaration to stand as a statement of claim, all the facts have appeared in the declaration; I think this declaration does not give the information that a statement of claim would.

The plaintiff said that he would be in a great difficulty, as he had already signed judgment against one defendant.

LUSH, J.—Then amend your declaration so as to be as specific as a statement of claim would be. The defendant must have eight days to deliver his defence after delivery of amended declaration.

No. LXXIV.

Judicature Act, Order XIII., rule 6.

In an action for damages on the policy of a ship, the defendant made an application for inspection of the ship's papers before appearance. It was admitted that under the old practice inspection could not have been had before declaration; and the ground of the application was that if the claim proved to be well founded, appearance would be avoided altogether.

Lush, J.—Can the plaintiff in this action sign judgment in default of appearance?

Under Order XIII., rule 6, it was submitted that he could.

Lush, J.—Then I make the order.

Tuesday, Nov. 23.

No. LXXV.

15 & 16 *Vict. c.* 86, *s.* 19—~~*Interrogatories*~~ *Discovery*—*Judicature Act* 1875, *Order XXXI., rule* 12.

The rule in equity that discovery will never be given to a defendant in a suit until he has put in his answer to the bill, is varied by the Judicature Acts, and discovery will now be allowed in special cases before that stage.

No. LXXVI.

Interrogatories—Judicature Act, Order XXXI., rule 1.

This was a summons to strike out interrogatories delivered under the Judicature Acts by the plaintiff in an action for rent, on the ground that they were wholly in the plaintiff's knowledge.

Lush, J.—The statement of defence is not yet delivered, and you cannot know what is material to be asked. The claim is a perfectly simple one for five quarters' rent alleged to be due. I shall adjourn this summons till after the defence is delivered; and if I find the interrogatories to be unnecessary, I shall strike them out with costs. Parties must be taught not to take advantage of the provisions of the Act for the purpose of increasing costs.

No. LXXVII.

Lowther *v.* Bellairs.

This was an action against a stock-broker for differences on the sale of stock, and there was a counter-claim, which defendant desired to set-up, of unliquidated damages for fraudulent representation in respect of the shares for the price of which he was being sued. Defendant's application to continue under the new pro-

cedure, in order to avail himself of his counter-claim, was made on Saturday, and adjourned till Monday for an affidavit. On Monday, defendant did not renew his application; but to-day plaintiff took out a summons to strike out the statement of defence, which, it appeared, had been delivered to him that day, and which included a counter claim. No affidavit having been produced, the statement of defence was ordered to be struck out, and the defendant to plead under the old system.

No. LXXVIII.

NOTICE of trial is now never to be given where it is not intended to be acted upon, but is for the purpose of keeping the cause on the list. Per LUSH, J.

No. LXXIX.

COOKE *v.* OCEANIC STEAM COMPANY (LIMITED.)

Judicature Act 1875, *Order* ~~XXVI.~~, *rule* ~~12~~ 4—*Power to enforce discovery against a company*—17 *&* 18 *Vict. c.* 125, *s.* 50.

THIS was an action for damages for the loss of passenger luggage. A summons had been taken out for discovery of documents, supported by an affidavit under Order XXVI., rule 12. The affidavit stated that it was the practice of the defendant company to deliver to the passengers by their vessels tickets as receipts for their luggage, and that the ticket given to the plaintiff in accordance with this practice had been given up to the company. It was of this ticket that discovery was sought. An objection was taken on behalf of the defendants that the above rule applied only to interrogatories; and it was contended that if this was so, in the absence of any other provision in the Acts relating to discovery by a company, the practice in Chancery must prevail, which had always been to make an officer of the company a party to the suit when discovery was sought.

LUSH, J.—The Judicature Acts have in many cases to be supplemented by the Common Law Procedure Acts, and by sect. 50 of the Act of 1854 I am empowered to name an officer of the company to make discovery.

No. LXXX.

Judicature Act 1875, *Order XIV., rule* 1; *Order III., rule* 6; *Appendix A, sect.* 7—*Signing judgment on a specially indorsed writ.*

THIS was a summons to sign final judgment in an action for goods sold, which had been before Master Unthank, and was by him referred to the judge. The writ was indorsed as follows: "The plaintiff's claim is 36*l.* 5*s.* for balance of account for goods sold. It was contended for the defendant that this was not a special indorsement under Order III., rule 6, and not within the examples given in Appendix A., sect. 7; that the ordinary form of indorse-

ment was similar to the present; and that the defendant, having filed a petition of bankruptcy, the plaintiff should prove his debt under that.

LUSH, J.—There is a form of special indorsement in Appendix A —for butcher's meat supplied—exactly like the one in question. It could not be intended that a list of items extending, perhaps, over three or four years should be indorsed on the writ. The ordinary form of indorsement would not be "balance of account," which implies an account paid. As bankruptcy is not a defence to an action, there is no defence to the present action. I think the plaintiff is entitled to sign judgment, as he would have been if he had delivered a statement of claim and there had been no statement of defence.

Tuesday, Nov. 23.

No. LXXXI.

MICHAEL *v.* CORNER.

Judicature Act 1873, *sect.* 22—*Judicature Act* 1875, *Order XIX, rule* 3—*Application to proceed under the Act in order to deliver counter claim.*

THIS was an action for non-acceptance of ship, delivered according to contract. The action had been standing for trial since July. The defendant desired to set up a counter claim for damages, in respect of the deposit of another ship with the plaintiffs as part payment. On behalf of the defendant it was stated that there had been fraudulent misrepresentation by the plaintiff as to his ship being of a certain class, whereas he had bought it a fortnight before as an unclassed ship. There was also a dispute as to whether the value of the ship deposited by defendant in part payment was £500 or £1000. It appeared that with regard to this second ship, a Chancery suit had been commenced by the defendant.

LUSH, J.—Unless you undertake to pay the costs of the Chancery suit, I shall not allow the counter claim to be set up. Subject to your giving security for those costs to the satisfaction of the master, I give you the direction asked. Costs of amendment to be plaintiff's in any event.

No. LXXXII.

AMIS *v.* CLARK.

County Court appeal—Judicature Act 1873, *ss.* 40, 45.

IN the case of an appeal from a County Court, in which his Lordship had already given eight days extension of the time for

appealing, in consequence of the Divisional Court not yet being constituted, he was asked to still further extend the time.

LUSH, J.—I cannot go on extending the time during which you may appeal. You must apply to the court to appoint a Divisional Court for hearing these appeals. I will give you two days' further time to make that application.

Wednesday, Nov. 24.

(Before QUAIN, J.)

No. LXXXIII.

Judicature Act 1875, *Order LII., rule* 2—*Order for sale of goods.*

THIS was an action for the unpaid balance on the sale of a horse, and for breach of warranty of a horse delivered in part payment. The plaintiff sold a horse to the defendant, and took another horse in part payment. It was alleged by plaintiff that this second horse was warranted sound, and had turned out not to be so. The present application was for leave to be given the plaintiff to sell the second horse.

QUAIN, J.—There is no pretence for saying that this is under Order LII., rule 2. According to your own statement you received the horse in part payment for the one sold. You can sell it, if you choose to do so, without any order.

No. LXXXIV.

Compulsory reference—Judicature Act 1873, *s.* 57.

THIS was an application to refer the question in an action for work done to a special referee. The action was brought to recover the sum of £500 for the erection of a skating rink. For the applicant, the defendant in the action, an affidavit was put in which stated that the surveyor had refused to give his certificate as required by the contract, and that a local if not a scientific investigation was necessary. For the plaintiffs it was urged that the certificate of the surveyor was not a condition precedent, under the contract, to their bringing this action; that the claim was for a lump sum; that the only question was whether the work had been properly done; that the plaintiffs were almost the only builders of skating rinks; and that the only objection that had been taken to the building was that the water lay.

QUAIN, J.—I will make an order to refer to a special referee to be agreed upon by the parties, and in the event of their failing to

agree, to a master, the defendant to furnish plaintiff within a week with full particulars of his objections to plaintiff's work, and to state in what respect he alleges the contract has not been performed.

No. LXXXV.

Judicature Act 1873, *s.* 24, *sub-s.* 2.

WHERE a judgment has been obtained, and an arrangement is subsequently entered into which would render it inequitable to carry that judgment into effect, execution will now be stayed by a judge in chambers (*Per* QUAIN, J.)

No. LXXXVI.

GEOGHEGAN *v.* DOMER.

Judicature Act 1873, *s.* 24, *sub-s.* 5.

AN application was made to stay this action in consequence of the pendency of an administration suit in the Chancery Division. The question in the suit appeared to be one between an executor, the present plaintiff, and the widow, the present defendant, as to whether the will of the testator should be administered according to French or English law. The action was in detinue for bonds, being part of the estate.

QUAIN, J.—In this case, a suit for administration by the widow to which the executor is a party, is pending. Under the old law, the moment an administration suit was commenced in the Court of Chancery, an injunction issued as of course to restrain the creditors from proceeding against the executor. I think the Acts intended proceedings to be stayed here in clear cases. Order to stay proceedings.

Petheram for defendant.

No. LXXXVII.

BELL *v.* LOWE AND OTHERS (executors).

Judicature Act, 1875, *Order XV., rules* 1, 2; *Order III., rule* 8.

THIS was a summons, similar to the above, to stay proceedings in an action pending an administration suit. The plaintiff had obtained an order for an executor's account from the Chief Clerk under Order XV., rules 1, 2; the writ being indorsed under Order III., rule 8.

QUAIN, J.—This is one of the cases intended by the Act; the order for account is the same as the old decree.

Crompton for the plaintiff.

E. Harrison for the defendant.

No. LXXXVIII.

Judicature Act 1875, *Order XXXI., rules* 5, 8, 10—*Objection to interrogatory—Sufficient answer.*

THIS was a summons under rule 10 of the above Order for an order requiring the defendant to answer further an interrogatory in an action for slander by a clergyman. The statement of claim alleged that the defendant had been going about Rock Ferry where the plaintiff's father resided, stating that the plaintiff had been inhibited. The statement of defence was a denial of this statement. The interrogatory in question was as to whether the defendant had or had not been going about Rock Ferry making this statement. The defendant's answer to this was as follows: I am advised and believe that the plaintiff is not entitled to this discovery, and therefore I object to answer. It was submitted on behalf of the plaintiff that the only mode of taking such an objection was by applying under Order XXXI., rule 5, to strike out the interrogatory. For the defendant it was contended that it was open to him to apply to strike out the interrogatory under the above rule, or to take the course he had adopted in the present instance of stating his objection in his affidavit in answer under rule 8 of the same Order. It had been clearly laid down that no interrogatories were allowed in actions of slander.

QUAIN, J.—I think the 8th rule of this Order applies only to cases of objection on the ground that the answer would criminate the defendant. The proper course to have been taken in this case would have been to have applied to strike out the interrogatory. But even if rule 8 could be held to apply to such an objection, the mode of stating it here would not be sufficient. Order for further answer.

No. LXXXIX.

Application to proceed under the Judicature Acts—Counter claim—Judicature Act 1873, *ss.* 22, 57—*Judicature Act* 1875, *Order XIX., rule* 3.

THIS was an application by the defendant in an action by a builder for £470, due for work and materials, to proceed under the new Acts to enable him to set up a counter claim for damages for non-completion. A summons was also taken out by the defendant to refer the cross claims. The defendant offered to bring £360 into court.

QUAIN, J.—I will order that, upon the defendant bringing £360 into court, the cross claims be referred to a special referee to be agreed upon by the parties. A statement of defence must be delivered within three days.

No. XC.

TWYCROSS *v.* GRANT AND ANOTHER.

Judicature Act 1875, *Order XXXI., rule* 20—*Striking out defence on failure to answer.*

THIS was an action under the Companies' Act 1862, for issuing a fraudulent prospectus. Several orders had been made in July, September, and October, calling upon the defendant Grant to answer interrogatories. An application to strike out defendant Grant's defence for failure to answer had been made before Mr. Justice Lush (LAW TIMES, Judges' Ch. No. XXV.), who gave him a week further, but as he had not complied with the order, the application was now renewed. On behalf of the defendant the affidavit in answer was produced, but it had not yet been filed.

QUAIN, J.—I never heard of such frightful procrastination. The power given by the Act was inserted expressly to meet the case of such procrastinators as the defendant. I will make the order to strike out his defence unless he files his answer within twenty-four hours. Costs of this application to be paid by defendant Grant.

No. XCI.

Application to proceed under the Judicature Acts—Counter-claim——Judicature Act 1873, *sect.* 22—*Judicature Act* 1875, *Order XIX., rule* 3.

THIS was an application by the defendant in an action on a charter-party for £73, to proceed under the new Acts to enable him to set up a counter-claim for £203 odd, as damages for short delivery and injury to cargo. The defendant had pleaded, amongst other pleas, one of set-off. He produced an affidavit stating that he was advised and believed that he had a good counter-claim as above. For the plaintiff it was urged that when he brought the action, he was advised that there could be no set-off, as the other side had no liquidated claim; and that if the counter-claim was allowed, it would be necessary for him to get evidence from Australia to meet it.

QUAIN, J.—I would not for a moment give these rules an operation that would oust the plaintiff from a vested right. But this is in reality only a question of procedure, and in no way alters the rights of the parties. Allowing the counter-claim instead of a cross action is merely giving another and a better remedy for enforcing the same right. That being so, it becomes entirely a question as to terms; and that being an important question, I will take time to consider it.

Subseqnently, the order was granted on the terms that the plaintiff should have a week to consider whether he would discontinue his action, and if he elected to do so, that the defendant should pay all the costs, on the ground that setting up a counter-

claim which was not pleadable when action was begun was like pleading a defence arising after action, and the defendant must be subject to some terms, as in Order XX.

No. XCII.

DRAKE'S PATENT CONCRETE *v.* DOWER.

Judicature Act 1873, *s.* 25, *sub-s.* 8; *Judicature Act* 1875, *Order LII., rules* 3, 4—*Injunction.*

THIS was an *ex parte* application for an injunction to restrain the defendant from pulling down a building which he alleged was not built according to contract. A house was in the course of erection by the plaintiff for the defendant, and the defendant had begun to pull it down.

Order given to restrain the defendant from pulling down the partially erected house, or any part of it.

Thursday, Nov. 25.

No. XCIII.

Judicature Act 1873, *s.* 25, *sub-s.* 8; *Judicature Act* 1875, *Order LII., rule* 4—*Injunction—Receiver.*

THIS was an *ex parte* application for an injunction to restrain the defendant from parting with goods in his possession, and for the appointment of a receiver to protect them. An action was pending for the return of oats and straw wrongfully taken possession of by the defendant.

QUAIN, J.—This is a common action of trover.

No order.

No. XCIV.

Judicature Act 1873, *s.* 25, *sub-s.* 8; *Judicature Act* 1875, *Order LII., rules* 3, 4.

THIS was an *ex parte* application for an order for inspection for the purpose of ascertaining the weight of oats and straw sold, and for an injunction to restrain the defendant from parting with the possession of them until such inspection had been had. An action was pending for the price of oats and straw sold.

QUAIN, J.—How can I order a man not to part with his own property? I have no objection to give you an order for inspection, but I cannot do that *ex parte*. You must take out a summons.

No. XCV.

GODDARD *v.* POOLE AND ANOTHER.

Judicature Act 1873, *sect.* 22; *Judicature Act* 1875, *Order L., rules* 2, 4.

THIS was an action brought on a bill of exchange for £110, drawn by defendant Poole and indorsed to plaintiff. Poole had become bankrupt, and suffered judgment by default; Lowring had been appointed trustee. This was an application to proceed under the new Acts, and to let in Lowring, the trustee, to defend the action, £180 being paid into court.

Bremner, for Poole's trustee, said that the judgment had been snapped against them.

Knight for plaintiff.

QUAIN, J.—It is only a question of terms. I will order that the judgment be set aside on payment of costs, and that the trustee be at liberty to defend in the name of the debtor; money to remain in court.

No. XCVI.

HANCOCK AND OTHERS *v.* DE NICEVILLE.

Equitable replication—Judicature Act, s. 22; *s.* 24, *sub-s.* 1.

THIS was a summons for leave to amend replication, which had been struck out by Mr. Justice Lush (LAW TIMES Nov. 20, Judges' Ch. No. LII.). The declaration in this case was for goods sold and delivered. Pleas: *Non assumpsit* and coverture. The replication had been amended by stating that the defendant was possessed of separate estate.

R. Williams for plaintiff.—We wish to proceed under the Judicature Act in order to enable us to avail ourselves of this replication, which is good in equity. This is not the case of replying to a plea of infancy or coverture, fraudulent concealment of infancy or coverture, which would be bad. We do not allege any concealment.

L. Kelly for defendant.—If this amendment is allowed, the cause should be sent over to the Chancery Division, as the question will be purely one of equity.

QUAIN, J.—That would soon bring us back to the old system. This suit began and went to plea upon the personal undertaking of this lady to pay for goods sold and delivered, and she pleaded coverture; the plaintiff now desires to turn it into a suit against her separate estate. Under these circumstances, I cannot give him better terms than that on payment of all costs from writ downwards, the plaintiff may turn his declaration into a statement of claim.

No. XCVII.

AMIS *v.* CLARK.

Appeal from County Court—County Courts Act, s. 6; Judicature Act 1873, *s.* 34, *sub-s.* 2, *s.* 45.

THIS was an *ex parte* application with reference to appealing from a County Court Judge. The matter had been twice before Mr. Justice Lush, who had given first a week and then two days' extension of the time for appealing, for the purpose of appealing to the divisional court, when constituted.

E. W. Byrne for the applicant.—I first applied to Vice-Chancellor Malins, but he said he could not assist me. I then applied to the court, but they said they could do nothing, as a divisional court was not yet constituted. I suggested that they should constitute one, but they declined to do that, and said a meeting of the Judges would first be necessary. I call your Lordship's attention to what was done by the Vice-Chancellor in *Eccles* v. *Eccles* (W. N. Nov. 20, Ch. p. 194), and ask you to adopt that course in the present instance.

QUAIN, J.—I should not be disposed to follow exactly the form of the order in *Eccles* v. *Eccles* (*ubi sup.*). I think that I had better give you a rule *nisi*, calling upon the plaintiff to show cause before the Judge in Chambers why the judgment in his favour should not be reversed. You must have a verified copy of the Judge's notes, under Order LVIII., rule 11.

Solicitors for the appellant, *F. J.* and *G. J. Braikenridge.*

Friday, Nov. 26.

No. XCVIII.

Application to sign judgment—Counter claim—Judicature Act 1875, *Order XIV., rule* 1; *Order XIX., rule* 3.

THIS was a summons in an action for milk sold and delivered where the writ was specially indorsed, calling upon the defendant to show cause why the plaintiff should not sign final judgment. The affidavit stated the plaintiff's demand was for £36 4s. 4d. for milk delivered, and that in plaintiff's belief there was no defence to the action. On behalf of the defendant it was admitted that the sum named was due; but it was stated that he had a counter claim to an equal or greater amount. The counter claim consisted in the breach of a contract in writing to supply the defendant with sixteen gallons of milk *per diem*, at 1s. 8d. per gallon; the alleged breach being that the plaintiff only supplied from four to six gallons *per diem*. In consequence of this default, the defen-

dant, who had contracts to supply several large institutions, had to procure milk at 2s. per gallon, and to pay the carriage for it.

QUAIN, J.—This is a proper counter claim, The original action for milk delivered and the counter claim are based on the same agreement. I order that the defendant be allowed to defend, confining his defence to his counter claim; and that both the original action and the counter claim be referred to the master.

No. XCIX.

Application to proceed under the Judicature Acts—Set-off—Judicature Act, 1873, *s.* 22—*Judicature Act*, 1875, *Order XXII., rule* 10.

THIS was an application by defendant to proceed under the Judicature Acts, for the purpose of obtaining judgment for the balance, if the set-off should be found to be in excess of the plaintiff's claim. The claim of the plaintiff was for £28 odd; the set-off was stated to amount to £96. The declaration had been delivered in March; the pleas, one of which was a set-off, in April.

QUAIN, J.—To grant this application will affect no alteration in the legal rights of either party; it is purely a question of procedure. I only give the defendant the power of raising the question of the amount of his claim at the trial. The defendant does not now introduce a new claim. He has pleaded a set-off; and very properly wants to get his claim, which overtops the plaintiff's, decided in this action. I think that it is highly desirable to give him the opportunity he asks for, and I shall therefore do so.

No. C.

Judicature Act, 1875, *Order LI., rule* 4—*Consolidation of actions.*

THIS was an appeal from the refusal of a master to allow one statement of claim to be delivered by a plaintiff who had issued two writs against the same defendant. One writ was for malicious prosecution; the other for amount of salary due as manager, including three months salary in lieu of notice.

No order; appeal dismissed with costs.

No. CI.

Application to sign judgment—Judicature Act 1875, *Order III., rule* 6; *Order XIV., rules* 1, 3.

THIS was an appeal from the decision of Master Johnson, refusing leave to sign judgment on a specially indorsed writ. The plaintiff's affidavit stated that in his belief there was no defence to the action. Issue had been joined. The writ was served before Nov. 1st.

QUAIN, J.—I cannot give the plaintiff in this case the benefit of the remedy under Order XIV. This is a very special remedy; and I can only give it according to the letter of the Act. This is not a specially indorsed writ under Order III., rule 6.

Appeal dismissed.

A precisely similar application was then made in another case, on appeal from Master Dodgson.

QUAIN, J.—I have just decided the question. The writ having been served under the old procedure, it is impossible that it can have been specially indorsed under Order III., rule 6.

Appeal dismissed.

In another case an application was then made, on appeal from a Master, similar to the above, with the difference that the writ had been served since Nov. 1. This was an action for the price of steel and wooden shutters. The plaintiff's affidavit stated that there was no defence. The defendant's affidavit stated that the shutters were not in repair; and that the plaintiff had admitted this by sending a man, who was now repairing them. It was objected to the defendant's affidavit that it did not state to how much of the claim the alleged defence went, as it was bound to do under Order XIV., rule 3; and it was pointed out that the affidavit only spoke of steel shutters, whereas there was a claim of £25 odd for wooden shutters.

QUAIN, J.—To allege that a man is repairing the shutters only goes to show that that is being done which will prevent the necessity of any reduction of the claim. This is one of the most beneficial parts of the new procedure.

The defendant asked for an adjournment that he might file a further affidavit.

Adjourned for a week.

No. CII.

CAPPELEUS *v.* BROWN.

Application to proceed under the Judicature Acts—Counter claim—Judicature Act 1873, *s.* 22; *Judicature Act,* 1875, *Order XIX., rule* 3; *Order XX., rule* 3.

THIS was an action for the price of timber by a Norwegian merchant, The present application was by the defendant to proceed under the Judicature Acts on appeal from Master Manley Smith. The declaration was delivered on Oct. 30.

Knight, for the defendant.—We desire to set up a counter claim for insufficient delivery in respect of other cargoes. We are ready to pay the money into court.

Edwyn Jones for the plaintiff.—The present action is brought for the price of timber delivered in pursuance of a contract made in April; the counter claim which they ask to set up is that the delivery of timber, in pursuance of a contract made in March, and for which they have paid, was insufficient. If the Act is held to

allow such a counter claim, it will be a great hardship to merchants.

QUAIN, J.—That the counter claim here set up is brought upon an earlier contract than the original action may be a very good defence to it, but is not a sufficient reason for refusing to allow it. I have a discretion as to allowing the defendant to set up a counter claim; and may strike it out, after it has been set up, when I think it ought not to be allowed. For instance, in an action for assault and battery, I would not allow a counter claim to be set up for seduction of defendant's daughter. It was the scandal of the past procedure that A. might have a liquidated claim against B., and B. a claim for damages against A., and yet B. could not set up his claim in an action by A., but must bring a fresh one. Pleading a counter claim under circumstances such as the present, I look upon as analogous to pleading a defence arising after action brought, and therefore it comes within the principle of Order XX., rule 3. I order that defendant be at liberty to deliver his counter claim; and that the plaintiff have a week to consider whether he will continue his action. If he elect to discontinue, all the costs to be his.

Decision of Master reversed. Appeal allowed.

No. CIII.

Judicature Act, 1875, *Order LVIII., rule* 6—*Appeal no stay.*

IT is to be understood that an appeal is now no stay of proceedings or execution; and therefore when an application is made to stay for the purpose of an appeal, the applicant will be put under terms. Per QUAIN, J.

No. CIV.

Judicature Act 1875, *Order XXXI., rule* 12—*Discovery of documents.*

THE Order for affidavit of documents will be granted as a matter of course, without requiring the applicant to state what is the nature of the documents which the other party has in his possession. Per QUAIN, J.

Saturday, Nov. 27.

No. CV.

Particulars.

IT was presumed that under the Judicature Acts, particulars of claim would be unnecessary. The statement of claim, or the indorsement on the writ, should give full particulars. Per QUAIN, J.

No. CVI.

Signing judgment on specially indorsed writ—Judicature Act 1875, *Order III., rule* 6, *Order XIV., rule* 1.

THIS was an appeal from the order of a district registrar to pay money into court as a condition for not signing judgment in an action for goods sold and delivered. The writ was served before Nov. 1.

QUAIN, J.—The writ could not be indorsed under Order III., rule 6. The registrar had no power to make this order.

Order rescinded.

No. CVII.

Judicature Act 1875, *Order XIX., rule* 4—*Pleadings not to contain evidence.*

ON the application of a defendant, three paragraphs were struck out of a statement of claim, as being an infringement of the rule that pleadings are not to contain evidence.

No. CVIII.

HABERSHON AND ANOTHER *v.* GILL.

Judicature Act 1873, *s.* 25, *sub-s.* 80—*Judicature Act* 1875, *Order LII., rules* 4, 3—*Application to appoint a receiver.*

THIS was an action of ejectment by a landlord against his tenant, a builder. An *ex parte* application was now made on behalf of the landlord for the appointment of a receiver.

Jason Smith for applicant.—The defendant, under a covenant in his lease, should have completed the house let to him by the plaintiff; he has not done so, and the house is now falling into disrepair. I ask, therefore, for a receiver to be appointed to prevent waste. I refer your Lordship to sect. 25 of the Act of 1873, subsect. 8. Where property is being wasted it is the universal practice of the Court of Chancery to appoint a receiver.

QUAIN, J.—There is an excellent provision in Order LII., rule 3, of the Judicature Act 1875, for the protection of property. But that order cannot be made *ex parte*. I can make no order without you give me an authority to prove that the Court of Chancery would appoint a receiver where property is falling into decay. This is a novel application here, and I will adjourn it for you to give me express authority on the point.

Monday, Nov. 29.

THE above application was to-day renewed by *Jason Smith*, who cited *Boehm* v. *Wood* (Turn. & R. 345), as an express authority for his application; and further argued that, even if the Court of

Chancery would not in this case have appointed a receiver under the old practice, the power of doing so was now much enlarged, and, in the words of sect. 25, sub-sect. 8, of the Act of 1873, might now be done in all cases in which it should appear just and convenient to do so.

QUAIN, J.—What you ask me for is to appoint a receiver in a pending action to take care of the property. Since Saturday I have had an opportunity of consulting a Vice-Chancellor, and I am told that the Court of Chancery never interfered with the legal estate, upon the application of the party who had the legal estate, and that he had never heard an application similar to the present. The latter part of sub-sect. 8 applies apparently only to injunctions, and not to the appointment of a receiver. With regard to the words "just and convenient" in the earlier part of sub-sect. 8, where such very wide words are used, it is necessary to refer to the old practice, and to interpret them by that. At all events I shall not do this *ex parte*; you can take out a summons, but I do not encourage you to do so. It seems to me to be unnecessary. My advice to you is not to go to the trouble and expense of having a receiver appointed, but to put in someone in the neighbourhood as a care-taker for yourselves.

R. S. Taylor and *Son*, solicitors for plaintiff.

No. CIX.

Judicature Act 1873, *s.* 57—*Local investigation.*

WHERE furniture in a house has to be examined, a "local investigation" within the above section is required, and a reference may therefore be ordered without the consent of all the parties interested. Per QUAIN, J.

No. CX.

Judicature Act 1875, *Order XIV., rule* 1; *Order III., rule* 6—*Application to sign judgment.*

THIS was an application to sign judgment on a specially indorsed writ. The writ was served in October.

QUAIN, J.—It is impossible that this writ can be specially indorsed under Order III., rule 6, because that rule did not then exist.—No order.

No. CXI.

RESTELL AND WIFE *v.* STEWARD.

Particulars of statement of claim—Embarrassing and inconsistent pleading—Judicature Act 1875, *Order XXVII., rule* 1.

IN this case, which was an action for slander, a summons for particulars of, to whom, when, and where the alleged slander was uttered, was taken out by the defendant. The master refused particulars as to whom, but allowed them as to when and where. From this decision both parties appealed to the Judge, who

adjourned the appeal till after the delivery of the statement of defence, *Shortt*, for the plaintiff, alleging that the defendant would probably set up a plea of justification.

The adjourned appeal now came on; and the statement of defence, which is set out below, was handed to the Judge.

QUAIN, J., refused to allow any particulars.

A summons, taken out by the plaintiff, was then heard, calling upon the defendant to amend his statement of defence, which was as follows:

Statement of defence.

1. The defendant denies that he spoke and published of the plaintiffs the words as in the third paragraph of the statement of claim mentioned with the meaning as therein alleged.

2. The defendant denies that the said words were spoken and published by him of the plaintiffs maliciously.

3. The defendant further says that a letter was written by the plaintiff Thomas to the plaintiff Emma Elizabeth, imputing misconduct to her (the contents of which were not divulged by the defendant to any persou) and that if any mention was made of such letter, or if anything was said by the defendant with reference thereto, such mention was made and such thing was said for the purpose of denying and contradicting any such imputation, and not otherwise.

4. The defendant further says that the companionship and hospitality of the several persons mentioned in the fifth paragraph of the statement of claim have not been lost, nor have the plaintiffs been deprived thereof by reason of the alleged speaking and publishing by the defendaut of the words as in the third paragraph of the plaintiffs' statement of claim mentioned.

Wheeler for defendant.—Paragraphs 1, 2, and 4, of the statement of defence are equivalent to a plea of not guilty. Paragraph 3 was inserted for the purpose of complying with Order XIX., rule 22.

Shortt for plaintiff.—Paragraph 3 is an attempt at justification couched in most embarrassing language. I object to it as inconsistent with the rest of the statement. The statement of defence is now one pleading, and cannot contain inconsistent allegations. I contend that under the new procedure there cannot be a plea of not guilty, and of justification.

QUAIN, J.—Mr. Wheeler is making experiments under the new system. I do not blame him at all; the pleading portion of the new procedure appears to me to be its weak side. The slanderous words alleged here are, "I have seen a letter imputing misconduct to the plaintiff's wife." Paragraph 3, is therefore, tantamount to a plea of justification. If the defendant wished to justify he should have said: "I have seen a letter from plaintiff to his wife, imputing misconduct to his wife." I will strike out, under Order XXVII., rule 1, all the latter part of paragraph 3, from the

words "the contents of which," down to the end, as embarrassing. But I cannot go quite to the length that Mr. Shortt would have me, and hold that not guilty and justification cannot now be pleaded together; consequently the statement of defence may stand, after the above amendment has been made.

Fallows and *Brown*, solicitors for the plaintiff.

Merriman, Powell, and *Co.*, solicitors for the defendant.

No. CXII.

WILSON *v.* DUNDAS AND STEVENSON (Garnishees).

Judicature Act 1875, *Order III., rule* 6; *Order XLV., rules* 2, 5.—*Attachment of debts.*

THIS was an application by Wilson, the judgment creditor, to attach half a year's salary, due to Mackenzie, the judgment debtor, from his trustees, Dundas and Stevenson.

Edwyn Jones, for the garnishees, contended that this was a trust debt, and therefore not attachable; and, further, that the debt was not due.

Shaw, for the judgment creditor.

QUAIN, J.—Order III., rule 6, expressly says that there may be a special indorsement of a trust debt. If Mackenzie brings an action against his trustee, he can recover his half year's salary. It is submitted for the garnishees that there cannot be an attachment of an equitable debt; but there is no distinction now between a legal and an equitable debt. I should be contravening the very object of the Judicature Acts if I was to hold otherwise. If we could not now attach an equitable debt sitting here, we might as well be under the *ancien régime*. The debt need not be due, as the words of Order XLV., rule 2, are "debts owing or accruing." As, however, the garnishee disputes his liability, I will order a special case to be stated for determining the question under Order XLV., rule 5.

Keays, solicitor for the judgment creditor.

Currey and *Holland*, solicitors for the garnishees.

No. CXIII.

WILLIAMS *v.* WRIGHT.

Judicature Act 1873, *s.* 25, *sub-s.* 8—*Injunction—Form of pleadings.*

THIS was an *ex parte* application for an injunction to restrain the plaintiff from building on a particular site.

QUAIN, J.—Why do you not go to the Court of Chancery?

Gorst, Q.C.—Because it is cheaper to come here, my Lord.

The dispute between the parties was as to the site of Wellington-road, New Brighton. There was a counter claim in the action, which stands for trial at the forthcoming Liverpool Assizes, and the

heading of the Liverpool form of pleadings, which was produced, was as follows: In original action, Williams, plaintiff, Wright, defendant; in counter claim, Wright, plaintiff, Williams, defendant.

QUAIN, J.—That is utterly wrong. The new procedure recognises the party setting up a counter claim in no other light than as a defendant. The heading of the Liverpool form is simply absurd.

Gorst, Q.C., in support of the application.—We want to stop the plaintiff from building, because he is obliterating our landmarks. The trial will come on in a fortnight, and the jury go to view next week. The other side have got an injunction from your Lordship to restrain the defendant from pulling down the plaintiff's building. We only want the plaintiff to be compelled to hold his hand, as the defendant has been compelled to hold his.

An affidavit was put in which stated that the plaintiff's building would conceal the site of the Wellington-road, which was the defendant's boundary, and that the plaintiff had not up to the present time desisted from building.

QUAIN, J.—The affidavit does not state that the plaintiff is doing anything to injure you. The building is already there; if there is any injury, it is done.

Injunction refused.

Solicitors for the defendant, *Chester, Urquhart, Bushby*, and *Halden*, agents for *Stockley*, Liverpool.

No. CXIV.

Schedule to Order of Oct. 28, 1875, *as to Court Fees under the Judicature Act* 1875.

THE taxing master's per centage on costs will be according to the scale in the above schedule, in all cases where the costs have not been taxed before Nov. 1. *Per* QUAIN, J. (after consultation with the masters).

Tuesday, Nov. 30.

No. CXV.

FOWLER *v.* LEWY.

Judicature Act 1875, *Order XIII., Rule* 5—*Application to sign judgment.*

THIS was an *ex parte* application under the following circumstances. Leave had been given, under the old system, to file a declaration, giving notice to the defendant, who was abroad. The declaration had not been delivered before Nov. 1. Lush, J., had said, on

being applied to, that the proceedings must be carried on under the Judicature Acts. The present application was to know whether the plaintiff could now sign judgment under the above rule.

QUAIN, J.—You must take out a summons.

No. CXVI.

WILLIAMS *v.* ANDREWS.

Joinder of third party as defendant—Judicature Act 1875, *Order XVI., rule* 13.

THIS cause had come on for trial, and been adjourned for a week, on the application of the *Solicitor-General*, who appeared for the defendant, in order that a special case might be stated, and an application made to the judge in chambers for the joinder of another defendant. The action was brought to recover extras on two building contracts, one for erecting a church, and the other for erecting a vicarage. On behalf of the plaintiff it was alleged that the present defendant was jointly liable with Dean Champneys, who is now dead. It was desired to join his executors as co-defendants with Andrews, which could not have been done under the old procedure. Time would, of course, be given them to plead, and the joinder asked for would probably save expense. On behalf of the executors, it was urged that such an application at this stage of the proceedings was most unreasonable; and that they were advised by counsel that they were not liable, the Dean being only liable on the contracts while he was vicar of the church in question. On behalf of the defendant, it was alleged that the defendant was unable to pay the whole sum for which he was sued; that Dean Champneys was liable on the contract, and that his executors should, therefore, be made parties; and that the defendant would not object to an adjournment for the purpose of giving them time to plead.

QUAIN, J.—I do not think it would be reasonable at such a stage of the proceedings as this to join a third party.

No order.

No. CXVII.

Judicature Act 1873, *s.* 45—*Appeal from County Court.*

AN application for a rule *nisi* calling upon the other side to show cause why the decision of a County Court Judge in their favour should not be reversed was refused, on the ground that the decision of the County Court Judge was correct.

No. CXVIII.

WOOD *v.* WAKEFIELD.

Injunction—Judicature Act 1873, *s.* 24, *sub-sect.* 5—*Stay of proceedings.*

THIS was an *ex parte* application on behalf of the defendants for a stay of proceedings in the above action.

Wilson for the defendant.—This is an action of trover by a lady who claims goods, sold by the defendants, who are executors, under an order of the Court of Chancery, when the ordinary administration suit was pending. *Walker* v. *Middlethwaite* is identical with this case, with the exception that the action there was for land instead of goods.

QUAIN, J.—I can well understand that when a bill was filed by all the creditors for administration, an action by a single creditor would be stopped by the Court of Chancery; but this is a different case. I cannot give you this summary relief, it will only be given in very plain cases.

Solicitor for the defendants, *Clements.*

Wednesday, Dec. 1.

No. CXIX.

E. ASSAM CO. (LIMITED) *v.* ROCHE AND GOVER.

Application to sign judgment—Judicature Act 1875, *Order* XIV., *rule* 1.

THIS was an action against a firm of solicitors for money due. The defendants were instructed to collect the debts due to the plaintiff company, and had not paid them over; they had a claim against the company of £70 odd, which was admitted, leaving a balance in favour of the plaintiffs of £131 odd. Master Manley Smith had allowed the plaintiffs to sign judgment for this sum, and against this order the defendant Gover appealed. The defendants had dissolved partnership.

W. L. Williams, for the plaintiff, read an affidavit by the secretary of the company that there was no defence to the action, and stated that Roche never disputed the debt, and had allowed judgment to go by default.

Norton, for the defendant Gover, put in an affidavit by defendant stating that he believed Roche and the plaintiff company to be in collusion; and that he had offered and was willing now to pay his share of the debt, provided that the company would undertake that execution should not be levied on him for the remaining half.

QUAIN, J.—This is a clear case.

Order of master affirmed. Stay of proceedings pending an appeal to the court refused.

No. CXX.

Discovery of documents — Judicature Act 1875, *Order XXXI., rule* 12.

THIS was an application by a defendant for an affidavit of documents. On behalf of the plaintiff it was urged that the order should not in this case be given, as the plaintiff resided in Sweden, and the object was to throw him over the present sittings. He had paid money into court. On behalf of the defendant it was stated that no notice of trial had yet been given.

QUAIN, J.—I will certainly not allow the plaintiff, a foreigner, to be thrown back by this summons. If he does not give notice of trial for these sittings, the defendant can come back.

No order.

No. CXXI.

ASKEW *v.* NORTH-EASTERN RAILWAY COMPANY.

Judicature Act 1875, *Order XXVII., rule* 1—*Striking out part of statement of claim.*

THIS was an application, on appeal from the master, to strike out from the statement of claim in the above action paragraph 14, which was as follows: "The defendants do not dispute, but have, in their correspondence with the plaintiff's solicitors, admitted that the plaintiff and his tenants are entitled to have access from the Redheugh Estate to the quay for the carriage, storage, and shipment of manure, dung, and goods of a like description, and have expressed their willingness to make the necessary arrangements and to give all facilities for that purpose."

The above action was brought by the owner of the Redheugh Estate for damages for an interference with his right to carry coals over the quay, for a declaration of his and the defendants' respective rights, and for an injunction ordering the defendants to desist from interfering with his right to carry coals over the quay.

C. Bowen for plaintiff.

Allen for defendants.

QUAIN, J.—This paragraph must be struck out. Can you point out even in the forms where you have such a precedent as No. 1 of Appendix C., any precedent for such a paragraph as this? Can you point out any section in the Act that enables you to plead admissions made by the other side to your solicitors? You put the defendants in the difficulty of not knowing whether to traverse the admission. Conciseness is intended by these rules to be the very soul of the new pleading. I believe all that is necessary in

ordinary cases is a statement of particulars of demand, and then a simple notice of the ground of defence, such as the Statute of Limitations, &c.

Order of master reversed. Statement of claim ordered to be amended by striking out paragraph 14.

Solicitors for the plaintiff, *Johnston* and *Harrison.*

Solicitors for the defendants, *Williamson, Hill,* and *Co.*

Thursday, Dec. 2.

No. CXXII.

Application to change the venue.

THE above application was made by the defendants in an action for the breach of a contract to supply milk, and the master had refused to change the venue from Middlesex to Wiltshire. This was an appeal from that decision. The defendants' affidavit stated that they resided in Wiltshire, that the cause of action arose there, that a question would arise as to a local custom with regard to the sale of milk, and that the application was not made for the purpose of delay.

QUAIN, J.—It is quite immaterial where the defendants live. Speedy trial is the rule in these days, and I cannot allow the defendants to postpone the trial of this case from January till March.

No. CXXIII.

ARMITAGE *v.* FITZWILLIAM AND OTHERS.

Judicature Act 1875, *Order IX., rule* 2—*Service of writ.*

AN *ex parte* application was made for an order for substituted service upon one of the defendants in the above action, who was in India. It was stated that his solicitors refused to accept service, on the ground that they had no instructions to do so.

Order made for substituted service upon defendant's managing clerk at his office, and upon his solicitors. Defendant to have six weeks to appear.

Solicitors for the plaintiff, *Seal.*

No. CXXIV.

ROSS *v.* GIBBS.

Particulars of claim.

IN this case particulars of claim were applied for. The statement of claim had not yet been delivered. It was stated that it was desired to get particulars before appearance, as it might be

important to do so, with reference to the question of costs. Till particulars were delivered, the claim could not be identified, and could not, therefore, be admitted.

QUAIN, J.—I do not sympathise with that grievance; the party served with the writ generally knows the nature of the claim against him. At present, the statement of claim may contain full particulars. The defendant comes too soon. I presume that the reason for omitting all mention of particulars from the Judicature Acts was that it was presumed that they would never now be necessary.

No order.

No. CXXV.

FENNER AND ANOTHER *v.* BEDFORD.

Judicature Act 1873, *s.* 25, *sub-s.* 8—*Injunction.*

AN *ex parte* application for a peremptory injunction to restrain the defendant in the above action, which was one of trespass, from committing certain trespasses, was made by *A. Charles.* On 29th Nov. the defendant broke into a rectory house belonging to the plaintiffs, and removed the furniture, &c., including a safe containing plaintiff's papers, and commenced to pull down the house. An affidavit was put in stating the above facts, and further that the roof had been removed, and that the defendant and others were at four in the afternoon on the day previous to this application continuing to pull down the above mentioned premises, and were, in the plaintiffs' belief, still pulling them down.

An injunction was granted, with liberty to serve any persons on the premises as well as the defendant.

Solicitors for the plaintiffs, *Thompson* and *Son.*

No. CXXVI.

AMEUNY *v.* H. H. THE NAWAB NAZIM OF BENGAL.

Judicature Act 1875. *Order XIV., rule* 1.—*Signing judgment on specially indorsed writ.*

THIS was an appeal from a master's refusal to allow judgment to be signed under the above rule. The plaintiff's affidavit stated that he had formerly been an *attaché* of the Syrian embassy, and was Professor of Arabic in King's College, London; that he was engaged by William David Fox to act as interpreter, &c., for Fox and the defendant, at a salary of £30 per month; that on Fox's death in October 1873, Lister O'Byrne was engaged as secretary, and plaintiff was re-engaged as assistant secretary, at the same salary as before; that two bills of exchange had been given for arrears of salary, which were dishonoured; that arrears of salary were still due; and that there was no defence to this action. For the defendant an affidavit made by Lister O'Byrne was read,

which stated that he was the representative of the defendant; that the plaintiff's affidavit was untrue; and that in the agreement under which the plaintiff was engaged, there was a clause to refer to two persons named therein any dispute that might arise as to salary.

Allen, for the defendant, pointed out that the plaintiff's affidavit did not allege that any services were tendered, and said that one ground of the defence was that, in point of fact, no services were performed.

Brownfield for the plaintiff.

Appeal dismissed.

Solicitor for the defendant, *F. C. Barker.*

Solicitor for plaintiff, *Ramsden.*

No. CXXVII.

Frakes *v.* Breslow.

Judicature Act 1873, *s.* 24, *sub-s.* 5—*Stay of action.*

This was an application to stay the above action, which was for non-delivery of goods, until a bill of exchange, which had been given by the plaintiff to the defendant, had become due. It was stated that the bill would become due on the 10th, and that the defendant's object in making this application was to see whether it would be honoured, as he expected to have ground for a counter-claim on this bill.

Quain, J.—I have exercised the power given me by sub-sect. 5 of the 24th section of the Act of 1873, in cases where the winding-up of a company or an administration suit is pending; but I shall only do it in clear cases such as those. Even if fraud is alleged by the defendant I should not go into that question here. I never heard of an action being stayed on the possibility of a future defence arising.

No order. Costs to be plaintiff's in any event.

No. CXXVIII.

Jones *v.* Turner.

Judicature Act 1875—*Order XXVII., rule* 1—*Striking out part of statement of claim as embarrassing.*

The following paragraphs had been ordered to be struck out of the statement of claim in the above case by Master Gordon as embarrassing:

6. The plaintiff thereupon exerted himself, by advertising and otherwise, to secure a purchaser of either the whole or the one-half share of the defendant's interest in the said quarry, and, amongst others, introduced to the defendant a Mr. Frederick Wallace, who, in conjunction with a Mr. Newman (so the plaintiff has been informed by the defendant), purchased

from the defendant one-half share of the defendant's interest in the said quarry.

7. But though the defendant has stated to the plaintiff the fact of the sale, as alleged in the 6th paragraph, yet the defendant refuses to tell the plaintiff the exact sum for which or the precise terms upon which such sale has been effected, and has thereby prevented and still prevents the plaintiff claiming a definite sum as due to him by the terms of the agreements set out in the 3rd and 5th paragraphs.

8. Whether the defendant has or has not sold his whole or part interest in the said quarry to the said Mr. Frederick Wallace separately, or in conjunction with the said Mr. Newman, the plaintiff cannot, except as explained in the 6th paragraph, state. The plaintiff has, however, every reason for believing that the defendant has in fact made such a disposition of his property to some one or more of the persons introduced by the plaintiff to the defendant as to entitle the plaintiff to the reward promised and agreed for either in the letter aforesaid or the 2nd July, A.D. 1875, or in that of the 3rd July, A.D. 1875, if not both.

Nasmyth, for plaintiff.—The plaintiff has to state his grievance clearly, and I fail to see how, in this case, he could have done so without the above statement.

Francis for defendant.

QUAIN, J.—Paragraph 6 states what the defendant told the plaintiff. That is not proper pleading. It would have been easy for the plaintiff to state that Newman and Wallace bought the half share, and then to have claimed his commission. He could then have administered interrogatories. I shall affirm the Master's order; but, as this is one of the peculiar cases where the plaintiff's case is in the knowledge of the defendant, I will order that the amendment may be deferred until after the defendant has answered interrogatories.

Friday, Dec. 3.

No. CXXIX.

WILTON *v.* BRIGNELL.

Judicature Act 1875, *Order XXXI., rule* 5—*Interrogatories.*

THIS was an action for libel by a solicitor in Sunderland against the publisher of the *Sunderland Echo*. The present summons was taken out to strike out certain interrogatories administered by the plaintiff to the defendant. From interrogatory 3: "Was not the passage set out in paragraph 3 of statement of claim intended by the defendant to apply to the plaintiff? If not, say to whom?" the last words were ordered to be struck out. Interrogatory 4: "Were not the words set out in paragraph 5," &c., was struck out as repetition. Interrogatory 8: "Were you yourself the writer of any of the passages mentioned in the statement of claim? If not, who was?" was also struck out.

No. CXXX.

Re THE NEW HAMBURGH AND BRAZILIAN RAILWAY COMPANY.

Judicature Act 1873, *sect.* 25, *sub-sect.* 6—*Interpleading before action.*

~~Moulton~~ Moncton, for the above company, applied to be allowed to interplead.—No action has yet been brought against us, but the company have received notice from Melhardo and Lloyd not to pay money or issue shares to Watson and Smith, as the former claim to have had the shares assigned to them by the latter; and from Watson and Smith we have received a letter denying the alleged assignment, and demanding the issue of the shares. This application is under sect. 25, sub-sect. 6, of the Act of 1873. Mr. Wilson has the following remark on that section: "This section appears to allow relief by interpleader in cases falling within it after notice of conflicting claims without waiting for an action to be brought," p. 157. I should submit that this sub-section was intended to remove the technical difficulty that existed with regard to interpleading, as to an action being first brought.

Batten for Watson and Smith.—We claim under an award of Horatio Lloyd, and say that there is no assignment. We should like an adjournment.

Pulbrook for Melhardo and Lloyd.

QUAIN, J.—Mr. ~~Moncton~~ Moulton's interpretation of the intention of sub-sect. 6 is quite worthy of consideration. The Trustee Relief Act enabled a trustee, where the trust property was the subject of dispute, to apply to the Court of Chancery for protection from suits, and it was not necessary in order to obtain this relief that actual proceedings should be pending. I am very much inclined to give that construction to the sub-section before me.

Application adjourned.

On the hearing of the adjourned application, QUAIN, J. refused to allow the company to interplead, on the ground that there was no sufficient notice of an absolute written assignment.

No. CXXXI.

SELIGMAN AND OTHERS (Trustees, &c.) *v.* MANSFIELD; WHITE *v.* MANSFIELD.

Judicature Act 1875, *Order XVI., rules* 17, 19, 21

AN application was made in the above actions, on appeal from Master Unthank. The first of these actions was brought by principals against their agent for an account; the second was for breach of contract. The defence in the second action was that Mansfield was an agent of the plaintiffs in the first action, and entered into the contract under their authority. Master Unthank had ordered that Seligman should be bound by the sum that Mansfield should be held liable to pay White, and that White should

be a party to the first action. The latter part of this order was now appealed against by White.

Trevelyan for White.—White has nothing whatever to do with the matters in dispute in *Seligman* v. *Mansfield*. We do not object to the first part of the order.

Butterworth for defendant.—Seligman are not the real principals; they are only trustees for an insolvent estate in New York, and our remedy over will be against that estate. Money was put into our hands to meet contingent liabilities. Your Lordship has very wide powers under the new Acts.

QUAIN, J.—It was certainly never intended by the Act that a plaintiff should be mixed up in a matter with which he had nothing to do. It was quite right that Seligman should be bound by the amount that Mansfield should be held liable to pay White, but what has White to do with the other action? What was chiefly in the mind of the framers of the Act when this section was inserted, were matters of suretyship. We used to have cases in which, an action having been brought against a surety on a bond, and the sum recovered, when the surety brought his action against the principal the whole question had to be tried afresh. That was the primary object of the section; but I see that it goes further than that. I shall not bring White into what may be an intricate question.

Butterworth:—I represent a merchant, who desires nothing more than to get rid of this money. Will your Lordship stay this action of *Seligman* v. *Mansfield* until *White* v. *Mansfield* is decided, if we pay 400*l*. into court?

Trevelyan.—Seligman, &c., will undertake to discharge out of any moneys they may recover in their action any debt or damages which White may recover against Mansfield.

QUAIN, J.—Mr. Butterworth admits £400, and will pay it into court; the remaining £800 is pure matter of account. The best thing that can be done for both parties is to refer the matter. I am disposed to think that I can still refer to an arbitrator under the Common Law Procedure Act; I think the power to do that is saved by sect. 76 of the Judicature Act 1873. No order, on Seligman undertaking to discharge out of any moneys recovered in this action any debt or damages which White may recover against Mansfield. Defendant to be at liberty to amend his plea by paying £400 into court. Any further liability to be referred to an arbitrator.

No. CXXXII.

Summons to refer.

THIS was a summons to refer in an action for work and labour done under a builder's contract, there being a counter-claim for penalties.

Bigham for plaintiff.

Webster for defendant.

QUAIN, J.—I can refer to an arbitrator, under the Common Law Procedure Act of 1852, or to a special referee, under the Judicature Act. There is a great practical difference between the two. The special referee sits *de die in diem*. He can report to the court, and there is an appeal from his decision. He sits, in short, as a species of court. It is a more elaborate procedure than that under the old reference—I am afraid almost too elaborate.

The parties having elected to refer to an arbitrator under the Common Law Procedure Act 1852, order accordingly.

Saturday, Dec. 4.

No. CXXXIII.

Judicature Act 1875, *Order XXXI., rule 5—Interrogatories.*

A SUMMONS having been taken out by the defendant in an action for breach of promise of marriage, to strike out interrogatories as to means (including one as to the settlement made by the defendant on his present wife);

QUAIN, J.—As long as these actions are allowed, and the defendant's means are allowed to be the measure of damages, interrogatories such as these are pertinent, and will be allowed.

No. CXXXIV.

WARE *v.* GWYNNE.

Counter-claim—Judicature Act, 1875, *Order XIX., rule* 3.

AN application was made in the above case to file a counter-claim of breach of warranty. The action was for the price of a boiler; issue had been joined, and the cause stood in the paper for the present sittings.

Webster.—This was the sale of a boiler upon the terms that it should be equal to the last. Had it not been a specific chattel, the plea of never indebted would have been sufficient to set up a defence under a breach of warranty. Counsel had some doubt on the point.

Harrison for plaintiff.

QUAIN, J.—This application is too late. You might have come a month ago. Cause to be restored to its place in the list; not to be heard before Wednesday.

No. CXXXV.

MOORE *v.* THE CITY AND COUNTY BANK.

Stay or transfer of proceedings—Companies' Act 1862, *s.* 138; *Judicature Act* 1873, *s.* 24, *sub-s.* 5, *s.* 36.

AN application was made to stay proceedings in the above action, or to send it over to the Chancery Division.

Hill, in support of the application.—The City and County Bank is now in liquidation. I am applying on behalf of the official liquidator. The whole question in the action will arise in the Chancery proceedings.

Vaughan Williams.—There is a difference between compulsory and voluntary liquidations. This is a voluntary liquidation, and the same power to stay is not given as in the case of a compulsory liquidation. See *Re Poole* v. *Fire Brick Clay Company* (L. Rep. 18 Eq. 542).

QUAIN, J.—I think this is a matter that should be argued in open court. I will stay the action. Costs hitherto incurred to be added to claim, and claim to be decided by the Chancery Division, to which the winding-up of the company is attached.

Monday, Dec. 6.

No. CXXXVI.

Judicature Act 1875, *Order XXXI., rule* 13—*Form of affidavit of documents.*

AN application was made for an order for a further affidavit of documents. It was submitted that the affidavit being in the old form was insufficient; but on the other side it was contended that as the order was issued on the 12th June, the old form of affidavit was sufficient. The affidavit had not been filed till after 1st Nov.

Affidavit to be amended, according to Form 9, Appendix B., within a week.

Tuesday, Dec. 7.

No. CXXXVII.

JUDICATURE Act 1875, Order XXXV., rule 7, expressly allows an appeal from a district registrar in respect of a matter in which he had jurisdiction only by consent; but there is no similar provision with regard to appeals from a master, apparently from an oversight. *Per* QUAIN, J.

No. CXXXVIII.

Judicature Act 1875, *Order XXXV., rule* 4; *Order LIV., rule* 2—*Jurisdiction of District Registrar.*

ON appearance to a judgment summons, issued by the District Registrar of Preston.

QUAIN, J., declined to hear the parties, on the ground that the District Registrar had no power to issue a judgment summons.

Wednesday, Dec. 8.

No. CXXXIX.

PEARSON *v.* LANE.

Judicature Act 1875, *Order XVI., rules* 5, 17, 18, 19—*Application to serve third person with notice.*

THIS was an action on a bill of exchange by the indorsee against the acceptor. The defendant's affidavit stated that the bill in question, which was for 500*l.*, was drawn by Josiah Muncey, and was accepted by the defendant on Muncey's promise "to put him up to a good thing on the Derby;" and alleged that there was no consideration for the acceptance by defendant, and that there was fraudulent misrepresentation on the part of the drawer, Muncey. The statement of defence had not yet been delivered. The present application was to serve Muncey with notice that the defendant claimed to be entitled to indemnity from him. In support of the application it was argued that if Muncey was not brought in as a party, an action would have to be brought against him. On behalf of the plaintiff, it was argued that, under rule 5 of Order XVI., it was open to the plaintiff to proceed either against the acceptor, or the drawer, or the drawer and acceptor, and that he had elected to proceed against the acceptor; that the defendant had no remedy over against Muncey; and that the third person, Muncey, should have had notice of this application.

QUAIN, J.—Whether the defendant in this case could bring an action against the drawer of the bill is doubtful, as this is not the case of an accommodation indorsement. If he could, it would be on the ground that the money was paid to Muncey's use. But the defendant's affidavit amounts to an allegation that the bill was got from him by fraud. The case of an acceptor claiming indemnity from a drawer seems to me to be within the words of rule 17. I think the words in rule 17, "on notice being given to such last mentioned person," refer to the notice that the defendant now asks leave to give, and do not mean that a notice to the third party is necessary of this application. I think the preliminary question is exclusively between the plaintiff and defendant. But I think this is a question that should be discussed; and I hope it will be taken to the division of the court now sitting. Leave given to serve Josiah Muncey with notice that the defendant claims indemnity from him. If plaintiff appeals against this order, the defendant to have one day's notice of appeal. The defendant to have a week to plead. Costs to be costs in the cause.

Solicitor for plaintiff, *W. T. Ricketts.*

Solicitors for defendant, *Probert* and *Wade.*

Wednesday, Dec. 8.

No. CXL.

JOHNSON *v.* MOFFAT.

Order for substituted service—Judgment signed too soon—Judicature Act 1875, *Order IX., rule* 2.

THIS was an action, under the Bills of Exchange Act, by the indorsee against the acceptor of a bill of exchange. An order for substituted service had been made by Master Dodgson, and judgment had been signed on Nov. 16. The present summons was to set aside the judgment on appeal from Master Dodgson, who had ordered that the judgment should only be set aside on payment of £65—the amount of the bill—into court.

Marshall Griffiths, for the defendant, argued that the non-appearance of the defendant was owing to his absence in Scotland, and that judgment had been signed before the time limited for appearance, which should be reckoned from the date of the taking effect of the order for substituted service.

The plaintiff, who appeared in person, argued that as this was an action under the Bills of Exchange Act, the old practice applied to it, which was that the days should run from the third attempt to serve the writ.

QUAIN, J.—I never heard of that practice, and shall not recognise it. Judgment has been signed too soon; and I shall now consider the application for leave to defend as though the time had not yet elapsed. The writ was issued in May, and the first attempt to get an order for substituted service was made in October. I shall not put the defendant under the terms imposed by the master of paying £65 into court, but he must pay the costs thrown away, as the condition of obtaining leave to appear.

No. CXLI.

PITTEN *v.* CHATTERBURG.

Interrogatories—Discovery—Judicature Act 1875, *Order XXXI., rules* 1, 5, 12.

THIS was an application to strike out an interrogatory. The interrogatory objected to was the usual one as to documents.

Warburton Pike, in support of the summons.—Under the old practice, in order to obtain discovery of documents, an affidavit as to one particular document in possession of the other side was necessary. When there was a difficulty about making that affidavit, a practice grew up of inserting an interrogatory as to documents, and thus obtaining discovery; and this practice was found

so convenient that it became general. Now that interrogatories can be delivered without an order, I contend that that interrogatory should no longer be allowed. The point is generally important, but especially so with regard to actions of ejectment.

Poulter shewed cause.—What Mr. Pike acknowledges was found convenient under the old practice I think would still be found so.

QUAIN, J.—I think Mr. Pike's objection is unanswerable. We are now inquiring whether you have to get leave for discovery, or can get it without an order. My opinion is that you have not the right to put this question at the end of your interrogatories without first getting an order.

Interrogatory struck out.

No. CXLII.

Action upon bill of exchange—Service of writ upon partners—Judicature Act 1875, *Order II., rule* 6; *Order IX., rule* 6—18 *&* 19 *Vict. c.* 67.

AN application was made in this case as to whether there had been sufficient service of the writ of summons, which raised an important point as to the construction of Order II., rule 6. That rule lays down that "With respect to actions upon a bill of exchange or promissory note, commenced within six months after the same shall have become due and payable, the procedure under the Bills of Exchange Act (18 & 19 Vict. c. 67), shall continue to be used." Under the Bills of Exchange Act personal service of the writ was in all cases necessary: but under Order IX., rule 6, of the new Act, special provisions are made for service of the writ where partners are sued. The question now raised was whether service on a partnership under these provisions was good service in an action under the Bills of Exchange Act?

QUAIN, J.—I am of opinion that you cannot take advantage of Order IX., rule 6, if you are suing under the Bills of Exchange Act. I think that, in the face of Order II., rule 6, it would be too strong a decision to strike out the words "personal service" from that Act. With the exception that the onus of obtaining leave is shifted from the defendant to the plaintiff, you can get the same advantage now under Order XIV., rule 1, by specially indorsing your writ under Order III., rule 6, as you can by proceeding under the Bills of Exchange Act.

No. CXLIII.

Discovery of documents—Judicature Act 1875, *Order XXXI., rule* 12.

ON an application for an order for discovery of documents, the objection was taken that the action was one by a landlord against his tenant on a lease, and that, therefore, no discovery could be required by the plaintiff.

QUAIN, J.—This order is now given as a matter of course.

Thursday, Dec. 9.

No. CXLIV.

SELIGMAN *v.* HUTH.

Equitable set-off—Judicature Act 1875, *Order XIX., rule* 3.

THIS was an action in trover brought by the trustees of a bankrupt against the defendant, who was a banker; there was also a special count in the declaration for a breach of agreement in not applying bills as directed. The defendant now desired to set-off the money due to him from the bankrupt. Kaufman, the bankrupt, had sent from America the bills of exchange to the defendant which he had appropriated to settling the account between himself and Kaufman.

C. Bowen, for the defendant.—The question in dispute is whether a letter sent by Kaufman to Huth appropriated these bills to meeting specific acceptances; we deny that it did so. The action being brought in trover, we could not, under the old procedure, plead a set-off. I do not say that I could bring an action upon the debt; my application is to be allowed to plead it, not by way of counter-claim, but as a set-off.

Hall, for the plaintiff.—We claim these bills as trustees under Kaufman's bankruptcy, and say that they were sent as cover for specific debts. The defendant has proved for the debt under the bankruptcy in America.

QUAIN, J.—It was decided in *Phillips* v. *Allan* (2 M. & R. 575; 8 B. & C. 477) that proving for an English debt under bankruptcy proceedings abroad operated as a discharge. I do not think that you can set-off this debt against the assignees, unless you could bring it either under the statute of set-off or under an allegation of mutual credit. I will refer the question to the court.

No. CXLV.

SANDYS *v.* LOUIS.

Set-off—Judicature Act 1875, *Order XIX., rule* 3.

AN application was made by the defendant in this case to be allowed to set-off a County Court judgment for £58 odd against a judgment in the Court of Exchequer for £92 odd.

R. Williams for the plaintiff.

QUAIN, J.—We have always been in the habit of setting-off one judgment against another, but the peculiarity of the present application is that it is to set off the judgment of an inferior against that of a Superior Court.

Ultimately, the application was granted.

Solicitors for the plaintiff, *Rees, Hope,* &c.

Solicitor for the defendant, *Ody.*

No. CXLVI.

IVORY *v.* CRUICKSHANK THE YOUNGER.

Judicature Act 1875, *Order XIII., rule* 6; *Order XLII., rule* 4.—*Signing judgment for recovery of specific goods.*

AN application was made in this case under the following circumstances. The action was brought for rent, and for the return of specific goods; the defendant had failed to appear. Judgment had been signed for the amount of the rent; but the judgment officer had refused to sign judgment for the delivery of the goods without an order of the judge. It was stated that the goods detained were heirlooms and family relics, and that, therefore, a writ of inquiry should not issue to assess their value, under Order XIII., rule 6. What was desired was to obtain a judgment for the return of the goods, which would be equivalent to a decree of the Court of Chancery under the old practice, and then judgment could be enforced in either of the three modes pointed out by Order XLII., rule 4.

QUAIN, J.—The only judgment by default in an action for detention of goods mentioned in these rules is under Order XIII., rule 6. I will take time to consider the point.

Friday, Dec. 10.

QUAIN, J.—I think you were right in your argument that you are entitled to proceed in this case under Order XLII., rule 4. In order to do so you must have a judgment signed in your favour for the return of the goods. I doubt whether the judgment officers are right in not allowing you to sign judgment for the delivery of these goods without an order. The last words of Order XIII., rule 6, apply to proceedings under the old writ of delivery when the value of the goods would have to be assessed. You may therefore, sign judgment for the return of the specific goods, and then proceed under Order XLII., rule 4, as you may be advised.

Solicitor for the plaintiff, *Beddall.*

No. CXLVII.

RESTELL AND ANOTHER *v.* STEWARD.

Judicature Act 1875, *Order XXVII., rule* 1—*Summons to strike out amended paragraph in the statement of defence.*

THE previous proceedings in this case, and the statement of defence, will be found set out *ante*, pp. 87, 105.

The present application was to strike out from the amended

statement of defence, the latter of the two following paragraphs, which had been substituted for the one previously struck out.

3. As to so much of the third paragraph of the statement of claim as alleges that such a letter as that therein mentioned was written the defendant says it is true that such a letter was written.

4. The defendant further says that a letter was written by the plaintiff Thomas to the plaintiff Emma Elizabeth which imputed misconduct as is in the third paragraph alleged, and that if any mention was made of such letter, or if anything was said by the defendant with reference thereto, such mention was made and such thing was said for the purpose only of denying and contradicting any such imputation, and not otherwise.

Wheeler for the defendant.

Shortt for the plaintiff.

QUAIN, J.—In pleading justification you should use the very words alleged to have been uttered. In this case the plea should begin, "and the defendant says he has seen a letter from Restell to his wife," &c. I will make the order asked for.

Order to strike out paragraph 4.

Solicitors for the plaintiffs, *Fallows* and *Brown*.

Solicitors for the defendant, *Merriman, Powell*, and *Co*.

No. CXLVIII.

Application to sign judgment—Judicature Act 1875, *Order XIV., rule* 1; *Order III., rule* 6.

MASTER POLLOCK had refused in this case to allow judgment to be signed under the above rules, and this application was an appeal from that decision. The action was for the balance of an account stated on a share account.

Bigham, for the defendant, read an affidavit, stating that he had a good defence to the action; and argued that the above rule could not be applied where there was such an affidavit, and that some of the masters had so decided.

QUAIN, J.—A mere affidavit that the defendant has a good defence is not sufficient ground for refusing to allow judgment to be signed under this rule. That would be encouraging defendants to make illusory affidavits. I shall go into the merits.

The sole question in dispute appeared to be as to whether the defendant company were bound to settle differences on the closing of the account between the parties; the defendants admitting that in that case they would be liable for a balance against them of £416.

At the close of the argument, *Shortt*, for the plaintiff, read the copy of a letter, sent by the defendants to the plaintiff, undertaking to close the account whenever he wished.

QUAIN, J.—I will adjourn the case for you to verify that letter.

On the hearing of the adjourned summons, *Shortt* produced the original of the letter he had previously read.

Horace Brown, for the defendants, produced an advertisement

in the *Daily News*, which showed that the plaintiff was endeavouring to have the company wound-up in Chancery.

QUAIN, J.—This letter shows most distinctly that it was part of the arrangement between the parties that the plaintiff should have power to close his account whenever he wished.

Order to sign judgment. Decision of Master reversed.

No. CXLIX.

Reference to Judge by district registrar—Judicature Act 1875, *Order XXXV., rule* 6.

A DEFENDANT having appeared in person before a district registrar, and given an illusory address, the plaintiff had applied to the registrar for leave to sign judgment; and the matter had been referred by the registrar to the Judge.

QUAIN, J.—A district registrar cannot refer to the Judge under rule 6 of Order XXXV., unless a summons has been taken out calling upon the other side to appear before the registrar.

CL.

Appeals from Masters.

EVERY appeal is now a re-hearing, and, therefore, fresh affidavits may be used in all appeals from a master to the Judge in chambers. Per QUAIN, J.

Saturday, Dec. 11.

No. CLI.

TREVENA *v.* WATTS AND ANOTHER.

Transfer of pending action—Counter-claim.

THIS was an appeal from the order of Master Unthank that the declaration in this case should stand for a statement of claim, and that the defendant should be allowed to deliver a statement of defence and a counter-claim instead of pleas. The action was brought by a builder, who alleged that he had been stopped by the defendant from completing his contract, that upwards of £1000 was due to him, and that the surveyor had improperly refused to certify for the amount due. The counter-claim that the defendants desired to set up was for various breaches under the covenants.

Chitty, for the defendants.

QUAIN, J.—I shall treat this as a defence arising after action brought. I vary Master Unthank's order by giving plaintiff a week to elect whether he will go on with this action; if he elects not to proceed, defendants to pay costs up to master's order.

The defendants must give particulars of their counter claim within three days. If defendants by Tuesday, before one o'clock, elect to withdraw their counter claim, then the master's order to be set aside, and the costs connected with it to be the plaintiff's costs in any event.

Solicitors for the plaintiff, *Lewis* and *Lewis*.

Solicitors for the defendants, *Clarke*, and *Woodcock*.

No. CLII.

TOZER *v.* WALFORD.

Judicature Act 1873, *sect.* 25, *sub-sect.* 8—*Injunction.*

THIS was an *ex parte* application for an injunction in an action of ejectment.

G. R. Kennedy, for the plaintiff.—We wish to restrain the defendant from using and keeping on our premises, now occupied by him, a certain steam engine. The defendant has covenanted not to do any act dangerous to his co-tenants, or to the landlord. In consequence of the engine in question, the fire office, where we were insured, have refused to continue the insurance, and we are under a covenant with our superior landlord to insure. In the covenant of defendant to repair and to keep safe, there is an exception of accidental fire. This action was begun in the hope that the engine would at once be removed. It works night and day, and is therefore a nuisance to the co-tenants, as well as an actual damage to the plaintiff.

Injunction given to restrain the defendant from working his engine until the trial of the cause, the plaintiff undertaking to abide by any order the court may make as to any damages suffered by the defendant.

Solicitors for the plaintiff, *Webb*, *Stock*, and *Butt*.

Monday, Dec. 13.

No. CLIII.

(Before HUDDLESTON, B.)

SMITH *v.* HASELTINE.

Judicature Act 1875, *Order XVI., rules* 2, 13—*Application to join plaintiffs.*

A SUMMONS was taken out in this case to add as plaintiffs to the action Rooke Pennington, James John Newbury, and Benjamin Patchett. The affidavit of Pennington stated that the action was to recover certain letters patent, one-fourth interest in which had been absolutely assigned by the plaintiff to the

deponent, and that the remaining three-fourths of the plaintiff's interest had been assigned by him to deponent, Newbury, and Patchett to hold in trust for him (plaintiff). It was stated that the defendant was a patent agent.

HUDDLESTON, B.—You have to satisfy me of two things under Order XVI., rule 2, first, that there has been a *bonâ fide* mistake in the original issue of the writ; and, secondly, that it is a necessary change. The affidavit does not state that there has been a *bonâ fide* mistake; but I think that, looking at rule 13 of the same Order, I can make this amendment. If these parties had been originally joined as plaintiffs in the action they could not have been struck out. I shall make the order to add these parties as plaintiffs, but the original plaintiff must still give security for costs, as the assignment to Pennington and the others may turn out invalid.

No. CLIV.

WEIR *v.* BARNETT AND OTHERS.

Judicature Act 1875, *Order XXVII., rule* 1—*Summons to strike out statement of claim.*

THE present summons was on appeal from Master G. Pollock, who had allowed the statement of claim to stand. The action was brought for false representation with respect to certain debentures.

Petheram, for the defendants.—I want the plaintiff to state what false representations are made in the letter, and what in the prospectus? We know nothing about the letter. I say that under the old system of pleading my friend must necessarily have been more explicit. Ought we to be in a worse position now than we should have been formerly?

A. Charles, for the plaintiff.—This is almost exactly the form given in the schedule; it sets out the false pretences. What the defendant wants is for me to state what is his case. In the form in the schedule the knowledge was the plaintiff's, because he had been carrying on the business; in this case the defendant's case is not within our knowledge. My friend wishes to make us plead evidence.

HUDDLESTON, B.—As regards any false statements in the letter, it would be a question of evidence whether the defendant had anything to do with it; as regards any false statements in the prospectus, the defendants would be liable. It is a matter of evidence what statements are in the letter, and what in the prospectus. My idea is that, according to the spirit of the Act, the grounds upon which the plaintiff's claim is based should be stated in his claim; and here he sets out false statement A, false statement B, and so on. The real question at issue here is, did the defendants make a substantially false representation? Mr.

Charles has pointed out that the affairs of the company cannot be supposed to be in his knowledge.

Order of Master affirmed.

Solicitors for defendants, *Bailey, Shaw, Smith,* &c.

Solicitors for plaintiff, *Jackson, Fox* and *Ellen,* &c.

The following are the material paragraphs in the statement of claim:

3. On the 13th Nov. 1873 Messieurs Stewart and Lambe, public accountants, acting as agents of the defendants, sent to the plaintiff, and the plaintiff received a prospectus and letter relating to an issue of debentures in the said company.

4. The said prospectus and letter were issued by the authority or with the sanction or acquiescence of the defendants, who are jointly and severally responsible for the truth and accuracy of the statements contained therein respectively.

5. Except the information contained in the said letter and prospectus, the plaintiff had no information respecting the said company and the affairs thereof.

6. The plaintiff believing that the information contained in the said letter and prospectus was true and acting entirely upon the faith of the statements therein contained subscribed for, and took twelve of the said debentures, and paid the moneys payable in respect thereof. The plaintiff's application was accepted, and the said twelve debentures were issued and allotted to him by the defendants.

7. The plaintiff has since ascertained that the following statements contained in the said letter and prospectus were and are false and calculated to mislead and deceive the plaintiff, and the plaintiff alleges that the defendants falsely and fraudulently made the said statements to him, although they well knew that the same were false, with the intention to induce him to subscribe for and take the said debentures on the faith of them:

(Here follow the alleged false statements.)

8. The said debentures so bought by the plaintiff, upon faith of the representations aforesaid, are absolutely worthless, and the plaintiff has entirely lost the sums of money which he paid in respect of them.

Wednesday, Dec. 15.

No. CLV.

CRUSE *v.* KUTTINGELL.

Judicature Act 1875, *Order IX., rule* 13—*Order X.*

IN this case an order had been obtained for substituted service; the writ served under that order had not been indorsed with the day of the month and week of the service thereof. The judgment officer had refused to sign judgment on an affidavit of service of the writ. It was contended that Order IX., rule 13, applied only to cases of personal service of the writ.

HUDDLESTON, B.—It is not necessary to indorse a writ issued under Order X. in the manner described in rule 13, Order IX. In

such cases it is sufficient to file an affidavit of service; and on such affidavit being produced I order the judgment-officer to sign judgment.

Wednesday, Dec. 15.

No. CLVI.

LYNCH *v.* OVERSALL COAL COMPANY.

Jurisdiction of District Registrar—Judicature Act 1875, *Order XVI., rule* 10; *Order XXXV., rules* 1, 2, 3.

THIS was an action commenced in the Liverpool District Registry. Judgment had been obtained there, which was afterwards entered in London, under Order XXXV., rule 2. The present application was for the names of persons who were co-partners in defendant's firm, under Order XVI., rule 10. An objection taken that, under Order XXXV., rules 1, 3, the application should have been made to the District Registrar, and not to the Judge in Chambers, was overruled.

Order made.

No. CLVII.

CHAS. LEATHLEY (on behalf of himself and all others, the underwriters on the steamship or vessel *Cid*, at the time of the loss in the year 1873) *v.* ROBERT MACANDREW AND CO.

Judicature Act 1875, *Order XVI., rules* 9, 10; *Order IV., rule* 1.

THIS was an appeal from Master Gordon's order that the plaintiff should give the names and addresses of the persons on whose behalf he was suing. On behalf of the plaintiff, it was said that the order had been made under Order XVI., rule 10, which applied to co-partners, and with which the present action had nothing to do. The action was brought under the provisions of Order XVI., rule 9. On behalf of the defendant it was argued that, conceding that Order XVI., rule 10, did not apply, the defendant was entitled to addresses of the plaintiffs under Order IV., rule 1; and further that he might apply under sect. 7 of Common Law Procedure Act, and that, under the 21st section of the Judicature Act of 1875, that was still in force.

HUDDLESTON, B.—There is only one plaintiff in this case, and his address has been given; the other persons mentioned in the title are not plaintiffs. It has been conceded that rule 10 of Order XVI. does not apply here. Order XVI., rule 9, is borrowed from the Chancery procedure in administration suits, where one creditor might sue for all. Its object is to avoid multiplicity of legal proceedings. No rule to which my attention has been called justifies me in ordering that the names and addresses of the

persons on whose behalf, under rule 9, this action is brought, should be given.

Decision of master reversed.

Solicitors for the plaintiff, *Waltons, Bubb,* and *Waltons.*

Solicitors for the defendants, *Lawless* and *Co.*

No. CLVIII.

Warne *v.* Dell.

Application to transfer partnership matters to Chancery Division—Judicature Act 1873, *s.* 34.

This was an action commenced under the old procedure for money lent, in which the plaintiff was a publisher and the defendant an artist. An order had been obtained by the defendant to continue the proceedings under the Judicature Acts. The defendant had then set up a counterclaim for a partnership account. The dispute between the parties arose out of a publication of the plaintiff's which the defendant had illustrated, and the counterclaim alleged a right to a share of the profits of such publication. A summons had been taken out to strike out the counterclaim, which, together with the statement of defence, consisted of twenty-four folios. On the hearing of this summons, the Master had dismissed it with the suggestion that an application should be made to transfer the proceedings to the Chancery Division, where the claim for a partnership account could be gone into. The defendant then took out the present summons.

Oswald, for the defendant.—There are two descriptions of partnership, general and for a particular purpose; the one we allege is of the latter kind. Sect. 34 of the Act of 1873 assigns to the Chancery Division of the High Court all matters with respect to the taking of partnership accounts.

Tatham, for the plaintiff.—The agreement as to division of profits between the parties in this case does not amount to a partnership at all.

Huddleston, B.—The reason of the provision in the Act with regard to partnership matters is that the machinery of the Chancery division is the best suited for dealing with complicated partnership accounts, but this is not a matter of that kind. It is unnecessary to go through the cumbersome form of a suit in Chancery to decide the present question, and I think that it is one that should be referred.

Order to refer to master.

No. CLIX.

Society of Apothecaries *v.* Nottingham.

Discovery in action for penalties—Judicature Act 1875, *Order XXXI., rule* 12.

The above action was one for penalties, under the Apothecaries' Act, for carrying on business as a chemist without being duly

licensed. An application for discovery by the plaintiffs had been refused by Master G. Pollock, and that decision was now appealed against.

Glyn, for the plaintiffs, argued that as interrogatories were allowed in actions of libel to prove the libel, which was a punishable offence, discovery should be allowed in actions for penalties.

Rose, for the defendant, relied upon the recognised practice in equity, and upon a decision of Mr. Justice Lush, refusing discovery in an action for penalties: (No. LXI. *ante*, p. 27).

HUDDLESTON, B.—It is quite clear from the case of *Bickford* v. *Darcy* (L. Rep. 1 Ex. 354), that I have the power to grant discovery in this action; it is a question of discretion. That being so, I shall in this case, in exercise of my discretion, allow discovery.

Master's decision reversed. Order for discovery.

No. CLX.

Signing judgment on specially indorsed writ—Judicature Act 1875, *Order XIV., rule* 1.

THIS was an appeal from an order of a master, giving the plaintiff leave to sign judgment under the above rule. It was stated that the defendant was now at sea on his way to join his regiment, and that he had been served with the writ the day before leaving England.

HUDDLESTON, B.—To accept that as a reason for refusing the order would be to render this provision of the Act a dead letter.

Order of master affirmed.

No. CLXI.

HANBURY AND OTHERS *v.* NOONE.

Equitable defence—Judicature Act, 1873, *sect.* 24, *sub-sect.* 2.

IN this case, an action of debt and one of ejectment, by mortgagees against the mortgagor, had been consolidated. The defendant in his statement of defence claimed a right to redeem; and, on the hearing of a summons to strike this defence out, Master Gordon ordered the defence to be struck out unless the defendant brought the debt and interest into court in six days.

That decision was now appealed against.

Warburton Pike for plaintiff.

HUDDLESTON, B.—The defendant here claims a right to redeem. He can no longer get an injunction from the Court of Chancery, and he is now entitled to plead his equitable rights. But in the meantime the mortgagee must not be kept out of possession.

No order.

Thursday, Dec. 16.

No. CLXII.

MOSTYN *v.* THE WESTERN COAL AND IRON CO.

Discovery—Judicature Act 1875, *Order XXXI., rule* 12.

THIS was an application for discovery by the defendants in an action for half a year's rent. A question arose whether the defendants were not now entitled to the order as a matter of course.

HUDDLESTON, B.—There must be some slight grounds shown; but I have always thought that the fullest opportunities of discovery of every kind should be given; and the Act has now abolished the necessity of an affidavit for discovery, and of an order for interrogatories.

For the defendants it was then stated that discovery was desired of receipts of rent, &c., and the order was then given.

No CLXIII.

HARRISON *v.* MARKINS AND ANOTHER.

Judicature Act 1873, *sect.* 22.—*Application to proceed under the Judicature Acts.*

THIS was an action on a contract, and the present application was made, on appeal from Master Gordon, by one of the defendants to proceed under the new Acts, for the purpose of claiming a set-off against the plaintiff, and contribution from the co-defendant.

Order made.

No. CLXIV.

Signing judgment on specially indorsed writ—Judicature Act 1875, *Order XIV., rule* 1; *Order III., rule* 6.

THIS was an application to sign judgment under the above rule; the writ had been issued on the 7th Aug., and appearance had been entered on the 17th. Master G. Pollock, following Mr. Justice Quain's decision, that the words in Order XIV., rule 1, "under Order III., rule 6," must be taken literally, had refused the application. The special indorsement on the writ was in the same form as it would now be under Order III., rule 6. A summons had been taken out in respect of this application, but the defendant did not appear.

HUDDLESTON, B.—I shall allow judgment to be signed in this case.

Order made. Decision of master reversed.

No. CLXV.

TEBB *v.* LEWIS, KEMP, AND GREEN.

Application for direction as to third party—Judicature Act 1875, *Order XVI., rule* 21.

THIS was an action brought to recover a deposit from an auctioneer by the vendee. On the application of Lewis, the

auctioneer, Mr. Justice Lush had made an order to serve Green, the vendor, with a notice, under Order XVI., rules 17, 18 (No. XLVIII. *ante*, p. 21,) Green had now appeared under that notice, and the present application was for a direction as to future proceedings.

W. A. Lewis, for the defendants Lewis and Kemp. My application is mainly formal; it is necessary that I should apply under Order XVI., rule 21.

Beasley, for the plaintiff. We do not wish to deliver a statement of claim to Green.

HUDDLESTON, B.—I direct that Green be at liberty to defend upon the terms that he accepts the declaration or statement of claim as it now stands, and delivers his statement of defence and counterclaim, if any, to the plaintiff and Lewis. The plaintiff to be at liberty to apply, and Lewis to amend his defence, if necessary, within six days. Further hearing adjourned.

Solicitors for the plaintiff, *Lewis* and *Son*.

Solicitor for the defendants Lewis and Kemp, *Philbrick*.

Solicitors for the defendant Green, *Gover* and *Norton*.

No. CLXVI.

WAVELL *v.* THE NATIONAL PROVINCIAL BANK OF ENGLAND.

Application to strike out counter claim—Judicature Act 1875, *Order XIX., rule* 3.

THIS action was brought by the executor of a deceased underwriter against the defendants, who were the bankers of the deceased, for money due. The defendants had set up a counter claim for payment of a joint and several promissory note, signed by the deceased, held by them, and now overdue.

Castle for the plaintiff.

Mansel Jones for the defendant.

HUDDLESTON, B.—I shall not strike out this counter claim.

Friday, Dec. 17.

No. CLXVII.

MARSH *v.* THE MAYOR, ALDERMEN, &c., OF PONTEFRACT.

Striking out statement of claim as prolix—Judicature Act 1875, *Order XXVII., rule* 1; *Order XIX., rules* 2, 4, 9.

THIS was an action for work done in building a reservoir for the defendant corporation. Master Walton had ordered twenty-two paragraphs of the statement of claim to be struck out, with leave to the plaintiff to condense. The present hearing was on appeal from that order.

Tapping for the plaintiff.—This action is brought on two contracts, the first in May 1874, the second in Jan. 1875. The master

thought that the second contract was in substitution of the first; but that is not so. Therefore, by Order XIX., rule 9, I was compelled to set out both contracts. Even if this statement of claim was held to be prolix, that of itself is no ground for striking out any part of it; the proper remedy for prolixity in the pleadings being under rule 2 of Order XIX. Making an order for the amendment of a statement of claim is a very different thing to ordering the amendment of a declaration under the old system, as now the whole has to be reprinted. Part of the claim is for extras outside the contracts.

Butterworth, for the defendant.—I contend that for the purposes of this action the second contract was in substitution of the first. The statement of claim sets out both the contracts; and it alleges that there were borings made, and a staking-out of the ground, which was wrong and useless; that we refused to fence, and interfered with the works; that the plaintiff was apprehensive of an arch falling; and that his work was exposed to the weather. None of these allegations are assigned as breaches, and they are simply put in to create prejudice in the minds of the jury. By the second contract the parties agreed that the plaintiff should complete the reservoir in a good and businesslike manner. There is no breach alleged of the first contract; and what is claimed in this action arises entirely under the second contract. I am not able to answer the allegations that are made in respect of matters not assigned as breaches, and at the trial the jury will take them as admitted. Order XIX., rule 4, says that every pleading is to be made as concise as may be.

HUDDLESTON, B.—The statement of account between the parties shows that the whole claim arises out of the second contract. It would have been sufficient to have stated that there was a contract made in May 1874, between the plaintiff and the defendants, for certain works; that on that contract certain disputes arose; and that another contract was then entered into in Jan. 1875, by which it was agreed that the plaintiff should complete the works in a good and business-like manner. I would undertake to put this statement of claim, which now occupies five sheets, which is equal to fifty folios, into half a sheet, which would be equal to about four folios. The first principle of pleading under the Judicature Acts is to avoid prolixity.

Appeal dismissed.

Solicitor for the plaintiff, *Wood*.

Solicitors for the defendants, *Torr, Janeway, Tagart*, and *Co.*

No. CLXVIII.

HURST AND SON *v.* LLOYD.

County Court appeal—Judicature Act 1873, *s.* 45.

IN this case, *Rose* made an *ex parte* application for a new trial on the ground of misdirection by the County Court judge.

Rule *nisi*, calling upon the other side to show cause before the divisional court.

No. CLXIX.

Injunction—Judicature Act 1873, *s.* 25, *sub-s.* 8—*Judicature Act* 1875, *Order LII., rule* 4.

In an action for the obstruction of light and air, an application was made by the plaintiff for an injunction, compelling the defendant to take down a hoarding erected by him, till the trial. In support of the application it was stated that if the hoarding was allowed to remain during the winter months, the plaintiffs' kitchen and parlour would be in total darkness.

On the other side it was alleged that the plaintiff had built an additional story to his house, and that the defendant had then erected the hoarding in question to avoid being overlooked.

Huddleston, B.—The plaintiff claims an injunction in his statement of claim, and the action will be tried in March. He does not show me that the defendant had not a perfect right to put up this hoarding.

Injunction refused.

(Before Quain, J.)

Saturday, Dec. 18.

No. CLXX.

Andrews *v.* Stewart.

Application to sign judgment—Judicature Act 1875, *Order XIV., rule* 1.

This was an action by a broker for £214, the loss on a resale of 1357 bags of sugar bought by the defendant, and subsequently not accepted by him. An application had been made to Master Hodgson to allow judgment to be signed, which had been refused; and this decision was now appealed against.

On behalf of the defendant a counter claim was set up for money deposited with Finlay and Co., as security for a bill drawn upon a Liverpool firm, which bill had been duly honoured. The plaintiff Andrews was now the representative of Finlay and Co.

Quain, J.—On the hearing of these applications I do not pretend to try the action; all that I require is to see that there is a *bonâ fide* defence. I think the question as to the counter claim is too doubtful a one to allow the plaintiff to sign judgment.

Decision of master affirmed.

Monday, Dec. 20.

No. CLXXI.

AINSWORTH AND ANOTHER *v.* STARKIE AND ANOTHER.

Action for discovery—Judicature Act 1873, *sect.* 24, *sub-sect.* 1; *Judicature Act* 1875, *Order XIX., rule* 8.

THIS was an action for discovery, and the defendants had taken out a summons to set aside the statement of claim of discovery on the ground that it did not show that it was brought by the persons and for the objects and under the circumstances entitling it to be maintained. There was a further summons to set aside the interrogatories annexed to the statement of claim. The statement of claim, after alleging the facts of the dispute, which was as to water rights, stated that the matter had been referred to arbitration, and was still subsisting, and concluded as follows: 15. The plaintiffs are unable to obtain evidence of the matters mentioned in the interrogatories annexed hereto, and the defendant, Le Gendre Nicholas Starkie, has refused to give any information in respect thereof. 16. The plaintiffs claim a discovery of the matters mentioned in the interrogatories annexed hereto.

Williams for the plaintiffs.—We have authority for this proceeding in the concluding words of Order XIX., rule 8. The practice in equity, when there was a compulsory, or, I presume, a voluntary arbitration, was to allow a bill for discovery only. Starkie was not a party to the action; Starkie's tenant defended it. But we want the information from Starkie, the landlord, the real defendant.

Green for the defendants.—In equity the plaintiffs would have been bound to have shown by the bill how the documents were necessary to them, and to have specified those in respect of which they asked discovery. But I am only applying now for an adjournment, to see if the reference is carried out.

QUAIN, J.—We have often made here an order for interrogatories, pending an arbitration. I do not see the object of this statement of claim. Mr. Starkie has made himself a party under the reference, and he might have been joined as a party to the action, if you had applied to continue the proceedings under the Judicature Acts for that purpose. In equity, if discovery was required from someone who was not a party to the action, he was made a defendant. I will adjourn to see if the reference is carried out.

Adjourned.

No. CLXXII.

AMIS *v.* CLARK.

County Court appeal—County Courts Act 1875, *s.* 6—*Judicature Act* 1873, *s.* 45.

A RULE *nisi* having been granted calling upon the plaintiff in this action to show cause before a judge in chambers why the decision of the County Court Judge in his favour should not be reversed (No. XCVII. *ante*, p. 41,), cause was now shown. An application had been made to the County Court Judge for his notes of the case; but it appeared that he had taken none. He sent, however, a letter giving the reasons for his decision, which letter was duly verified; and certain affidavits had been agreed upon by the parties to supplement the letter. The County Court Judge had decreed specific performance of a contract to sell a house, and the defendant appealed from this decision on the grounds that he had never given his authority for the sale, and that, if he ever had given such authority, he had subsequently revoked it. The question turned upon whether the construction to be put upon a letter written by the defendant's wife to the agent, and the statements made in the affidavits as to a conversation between the parties, supported the alleged revocation.

QUAIN, J.—I am of opinion that this case has not been sufficiently made out for a decree for specific performance to be granted. In such cases the onus lies on the plaintiff; and the Court of Chancery would never grant specific performance except in clear cases. It is clear from the affidavit of the defendant himself, that there was a conversation between the defendant and the agent Bridge, about the house, and, as the plaintiff speaks to the exact sum of £160 as being mentioned by Bridge to him as the purchase-money, it seems probable that authority was given by the defendant to Bridge to sell. The question then arises whether that authority had been revoked. I am clearly of opinion that the letter of Mrs. Clarke to Bridge is a revocation of the authority that had been given; and that construction of the letter is borne out by the positive testimony of two witnesses, Mrs. French and Mrs. Clarke, as to a conversation between the parties on a subsequent occasion. With regard to that conversation, the agent only says that the authority given to him was not revoked, but does not say what did take place; whereas Mrs. French and Mrs. Clarke positively swear that the agent was then expressly told that he was not to sell the cottage. The County Court Judge was of opinion that a portion of Mrs. Clarke's letter was inconsistent with the idea that it was intended to revoke the authority to sell; but that is not how I interpret the words. The decision in the

County Court will be reversed; and, following the new practice, the appellant will have the costs of the proceedings in the County Court, as well as of the appeal.

No. CLXXIII.

BAKER *v.* NEWTON.

Judicature Act 1875. *Order XXXI., rule* 5.—*Interrogatories.*

THIS was an action by a principal against his agent for money received. The defence was that the transaction in question was not entered into by defendant as agent. The present application was to strike out interrogatories that had been delivered by the defendant to the plaintiff.

QUAIN, J.—I would allow any interrogatories that went to prove your case; but I will not allow interrogatories for the purpose of shaking the plaintiff's character. I shall order all these interrogatories to be struck out, except the 7th. Costs to be costs in the cause.

No. CLXXIV.

Injunction. Judicature Act 1873, *sect.* 25, *sub-sect.* 8.

AN application was made for an injunction to restrain purchasers of property belonging to the defendant in an action on two bills of exchange from paying the purchase-money to the defendant.

QUAIN, J.—The purchasers are not parties to the action. The plaintiff has no lien or claim upon this money at all. He is attempting to get an attachment before judgment. Application refused.

Tuesday, Dec. 21.

No. CLXXV.

LEE *v.* COLYER.

Striking out counter claim—Judicature Act 1875, *Order XIX., rule* 3; *Order XXII., rule* 9.

THIS was an action for assault, and for calling the plaintiff a scamp, a liar, and a thief. With the statement of defence a counter claim had been delivered for breach of an agreement to repair. Master Manley Smith had refused to order this counter claim to be struck out, and that decision was now appealed against. The alleged assault was that the defendant spat in the plaintiff's face. There was no written agreement to repair.

Raymond for the plaintiff.

Finlay, for the defendant, stated that the Master decided on the ground that the assault and abuse were used when the plaintiff

and defendant were disputing as to the non-repair of the premises.

QUAIN, J.—If the plaintiff holds under a written agreement, a parol promise to repair would not bind him, according to *Angell* v. *Duke* (32 L. T. Rep. N. S. 320.) But without entering into that question, the matters alleged in the counter claim are not really in any way connected with the plaintiff's cause of action. The assault alleged here is of a very serious kind, and that when it took place the parties happened to be talking about the state of this house is not sufficient to connect these two claims. I shall order that this counter claim be struck out.

Decision of master reversed.

No. CLXXVI.

County Court Appeal—Judicature Act 1873, *s.* 45.

THIS was an appeal from the decision of a County Court judge, in an action for the use and occupation of a foreshore, which the corporation of Penrhyn alleged that they had inherited. The County Court Judge had stated that his decision was given solely with a view to ensuring an appeal.

Rule *nisi* granted; cause to be shown before the newly constituted Divisional Court.

No. CLXXVII.

CLARKSON *v.* THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

Application to proceed under the Judicature Act—Judicature Act 1873, *s.* 22.

THIS was an action brought by Clarkson, a broker in England, on a policy of insurance. The declaration had been delivered in January.

French for the defendant. The real plaintiff in this case is Rivano, an Italian, he being the person interested in the policy. The circumstances of the loss were so suspicious that the Italian authorities ordered an investigation, with the idea of bringing a charge of fraud against Rivano. We have obtained an order for discovery of ship's papers from Clarkson; but he can only produce what Rivano chooses to send. Mr. Justice Brett refused to make an order upon Rivano for an affidavit of ship's papers. We desire to proceed under the Judicature Acts, in order to make Rivano a party to the action.

J. C. Mathew, for the plaintiff.

QUAIN, J.—I thought that it was the practice here to order the party interested to make an affidavit of ship's papers.

Application granted.

No. CLXXVIII.

ASKEW *v.* NORTH-EASTERN RAILWAY COMPANY.

Amending statement of claim—Judicature Act 1875, *Order XXVII., rule* 1.

AN application was made to strike out a paragraph from the statement of claim in this case. The paragraph had already been ordered to be struck out (No. CXXI., *ante*, p. 52), but had been re-inserted with a few verbal alterations.

Order to strike out amended paragraph.

No. CLXXIX.

BUTTERWORTH *v.* TEE AND WIFE.

Application to sign judgment—Judicature Act 1875, *Order XIV., rule* 1.

THIS was an action on a guarantee for the price of goods sold, given by a married woman in respect of her separate estate. The plaintiff now sought to sign judgment under Order XIV., rule 1. The matter had been before a master, who had referred it to the judge.

Bruce, for the defendant.

Charles, for the plaintiff.

QUAIN, J.—Under any circumstances, I could only give you in this action a judgment against the wife's separate estate, as you are not suing her personally on a guarantee. But I doubt whether Order III., rule 6, refers to anything but a monetary demand; and here you seek to charge the defendant's separate estate. I will give you liberty to amend your writ, but I question whether that will enable you to avail yourself of this rule.

No order, with liberty to amend the writ.

No. CLXXX.

Garnishee order—Judicature Act 1875, *Order XLV., rule* 2.

AN application having been made to a master for a garnishee order, and having been refused, on the ground that the affidavit did not state that the debt was due, that refusal was now appealed against. The affidavit stated that the debt was "owing and accruing," and the appellants referred to the decision in *Wilson* v. *Dundas* (No. CXII., *ante*, p. 48).

QUAIN, J.—I will make the order; but the attachment must be confined to that part of the sum which is stated in your affidavit to be accruing at the time of the judgment.

Decision of Master reversed.

No. CLXXXI.

OWENS *v.* STEAM COAL COMPANY.

Stay of proceedings. Judicature Act 1873, *sect.* 24, *sub-sect.* 5.

A RESOLUTION for a voluntary winding-up of the defendant company had been made in November, and an application was now made to stay proceedings in this action.

Order made to stay proceedings, the plaintiff to add his costs up to the present time to his claim.

No. CLXXXII.

County Court appeal. Judicature Act 1873, *sect.* 45.

AN application was made for an extension of the time for appealing from the decision of a County Court Judge.

QUAIN, J.—You might have applied to me at once for a rule *nisi*, but I will give you the extension of time you ask for.

Tuesday, Jan. 4.

No. CLXXXIII.

DENISON *v.* FRANKLYN AND OTHERS.

Signing judgment on specially indorsed writ—Judicature Act 1875, *Order XIV., rule* 1, *Order III., rule* 6.

THIS was an appeal from the decision of Master Johnson, refusing leave to sign judgment on a specially indorsed writ.

The writ was issued on the 12th May, renewed on the 3rd Nov., and an order for substituted service made on the 7th Dec. 1875.

The plaintiff's affidavit showed that there was no defence to the action. The special indorsement on the writ was, "The following are the particulars of plaintiff's claim: Balance of banking account due from the defendants to the plaintiff as bankers, 50*l.*"

It was contended for the defendants that the case decided by Quain, J. (No. CXIX., *ante*, p. 51) governed the present, and that this was not a specially indorsed writ under Order III., rule 6.

For the plaintiff it was contended that this case was distinguishable from the case referred to, as the writ was renewed, and an order for substituted service made and an appearance entered subsequently to the Judicature Act, and cited the case decided by Huddleston B., and reported *ante*, No. CLX., p. 73.

LINDLEY, J. discharged the order of Master Johnson, and ordered the indorsement on the writ to be amended by stating dates, plaintiff to be at liberty to sign final judgment for debt, and costs to be taxed.

Solicitor for the plaintiff, *Lammin.*

Solicitor for the defendants, *Tatham.*

No. CLXXXIV.

Discovery—Judicature Act 1875, *Order XXXI. rule 12.*

An application for discovery was made by the defendant in an action of ejectment. On behalf of the plaintiff it was objected that inspection had already been offered of the only two deeds that were relevant. The old rule was that the defendant in ejectment could not see the plaintiff's title deeds. The defendant was mortgagor, and the plaintiff mortgagee.

Lindley, J.—The defendant is not entitled to see documents that are not relevant to his case; unless he can show me what he wants, I shall not make the order. I do not understand what he can want to see except the mortgage deeds. No order, without prejudice to a future application.

No. CLXXXV.

Summons to refer—Common Law Procedure Act 1854, *sect.* 3—*Judicature Act* 1873, *sect.* 57.

This was an appeal from an order of Master Gordon's referring the matter in dispute to a surveyor to be agreed upon by the parties or, on failure of the parties to agree, to be named by the Master, upon a summons to refer to a master. The appellant contended that the Master had no jurisdiction to make such an order on a summons to refer to a Master; that the summons was governed by sect. 3 of the Common Law Procedure Act 1854, because it was to refer the whole question in dispute between the parties; that sect. 57 of the Act of 1873 only applies to particular questions with relation to documents or other specified matters arising incidentally in a cause; and that the reference to the surveyor would involve greater expense than to the Master, and the sum in dispute was only £30.

Lindley, J.—The Master had jurisdiction to make this order. With regard to the exercise of his discretion, he was shown a statement of account, and was of opinion that the questions arising upon it could be better decided by a surveyor than by a master; and I cannot interfere with that opinion.

No order.

No. CLXXXVI.

Judicature Act 1875, *Order XIV., rules* 1, 6—*Signing judgment—Payment into court.*

On a summons to sign judgment, under Order XIV., rule 6, the master had given the order unless the money was paid into court. That decision was now appealed from by the defendant. The action was for goods sold and delivered, and the defence was that the defendant never bought the goods and that they never were

delivered to him. An affidavit was read for the defendant which had not been before the master.

LINDLEY, J.—This comes before me as a substantially fresh application. On reading this new affidavit I think that the money should not be ordered to be paid into court.

Order for payment into court to be discharged. Costs to be costs in the cause.

No. CLXXXVII.

Signing judgment—Judicature Act 1875, *Order XIV., rule* 1.

ON an application by the defendant in an action to sign judgment according to the terms of the defence and the counter-claim, Master Dodgson had referred the matter to the Judge, as he could not transfer to the Chancery Division of the Court, which he thought was the course that should be taken. The action was brought on a bill of exchange by executors; the defendant claimed an administration order as next of kin.

Order for administration of intestate estate, and transfer to the Chancery Division; costs of the action to be disposed of by the Judge of that Division.

Tuesday, Jan. 4.

No. CLXXXVIII.

BANNICOT AND FRITH (EXORS.) *v.* HARRIS.

Amendment of statement of claim.—Striking out interrogatories.—Judicature Act 1875, *Order XXVII., rule* 1, *Order XXXI., rule* 5.

THIS was an action by executors for rent, due partly in respect of leasehold and partly in respect of freehold premises. The present summons called upon the plaintiff to show cause why the statement of claim should not be amended by giving particulars of dates and items as to rent claimed, and also of the title to the freehold; and there was another summons to strike out interrogatories delivered by the plaintiff.

Chitty for the defendant.—We are suing for large arrears of rent, partly due in the lifetime of testator, partly due since his death. They cannot claim rent as executors in respect of freehold premises.

Wilberforce for the plaintiffs.—The action is brought in the name of the executors by order of the Court of Chancery, the real plaintiff being the *cestui que trust*. As a matter of fact, I believe all the premises are leasehold, and that it is by a mistake that freehold was inserted in the statement of claim.

Order to amend the claim by stating the title of the plaintiff, if any. to the freehold premises, and the amounts and dates of

rent due; if the plaintiff has no title the claim to be amended accordingly.

On the hearing of the summons to strike out the interrogatories, the last one as to documents was struck out, LINDLEY, J., stating that he did so simply for the purpose of keeping the practice uniform.

No order as to costs.

CLXXXIX.

GERMAN BANK OF LONDON (LIMITED) *v.* SCHMIDT AND CO.

Signing judgment on specially indorsed writ—Judicature Act 1875, *Order XIV., rule* 1.

THIS was an action on a bill of exchange, of which the defendants were the acceptors, and the plaintiffs the indorsees and holders for value. The present summons was an appeal from Master Manley Smith's order, refusing to allow judgment to be signed under Order XIV., rule 1.

Safford for the plaintiffs.

Hornell for the defendants.—The drawer is being sued in Russia on this bill, and if we defend the action, we can bring him in as a third party, from whom we claim indemnity.

Order for judgment to be signed unless the defendants pay the amount into court within ten days.

Wednesday, Jan. 5.

No. CXC.

ROBERTS *v.* GUEST.

Signing judgment on specially indorsed writ—Judicature Act 1875 *—Order XIV., rule* 1.

THIS was an action brought to recover money on behalf of an administration estate. The summons was an appeal from the order of Master Watson, refusing leave to sign judgment under Order XIV., rule 1. The nature of the defence which it was desired to set up was a claim against the estate for costs in a suit in the Court of Chancery under an agreement to pay costs.

LINDLEY, J.—The defendant has no order yet for his costs, and he may never get one. Judgment to be signed, unless the defendant pay the amount claimed into court.

No. CXCI.

HOOPER *v.* GILES.

Where there is no statement of claim no statement of defence necessary—Judicature Act 1875*—Order XIX., rule* 2.

IN this case the district registrar of Gloucester had set aside a

judgment that had been signed under his order, and that decision was now appealed from. At the time of the defendant's appearance in the action she gave notice that she dispensed with a statement of claim, according to the provision of Order XIX., rule 2. Subsequently the defendant applied for an extension of time for delivering her statement of defence; but no defence having been delivered within the extended time, judgment was signed by the plaintiff under Order XXIX., rule 2, by order of the district registrar. The judgment so signed was set aside by the registrar on the defendant's representation that where no statement of claim was required or delivered, no statement of defence was necessary.

LINDLEY, J.—It seems clear that where the defendant dispenses with the statement of claim, and no statement of claim is delivered, no statement of defence can be required. Of course, where no pleadings are necessary, judgment cannot be signed under Order XXIX., rule 2.

Appeal dismissed with costs.

Solicitors for the defendant, *Thomas White* and *Sons*.

Solicitors for the plaintiffs, *Peacock* and *Goddard*.

Friday, Jan. 7.

No. CXCII.

JOHNSON *v.* WHITEHEAD.

Notice of appearance—Judicature Act, 1875, *Order XII., rule* 6.

THE writ in this action was issued at the Leeds District registry on 14th Dec., and judgment signed on 22nd Dec., in default of appearance. The defendant had entered appearance in London on 21st Dec., and had given notice on the same day to the London agents of plaintiff's solicitor. On this ground he had applied to master Sir F. Pollock to set aside the judgment, and the master had referred the application to the judge. For the plaintiff, it was contended that notice of appearance must be given to the plaintiff in person, or at all events to his solicitor in the country; while the case on the other side was, that notice to the London agent was sufficient.

LINDLEY, J.—The defendant is bound to give notice of appearance under Order XII. rule 6, and the question is what notice is sufficient. Looking at Order VII., of the additional orders of December 1875, I think that notice to the agent in London is sufficient. As, therefore, notice of appearance was given to the plaintiff before judgment was signed, the judgment must be set

aside. But as judgment was signed under a mistake, I shall impose the condition on the defendants that no action be brought. Costs to be costs in the cause.

No. CXCIII.

Ibbotson *v.* Whitworth.

Procedure under Bills of Exchange Act—District registry—Payment into court.—Judicature Act 1875, *Order II., rule* 6.

This was an action under the Bills of Exchange Act, in the district registry of Sheffield. The defendant had obtained leave to defend upon paying £40 into court. Judgment had been signed and execution issued for non-compliance with this condition, and the present summons was to set aside that judgment, and stay execution.

For the plaintiff it was contended that the proceedings being in the district registry of Sheffield, and the defendant having entered appearance there only, the money should have been paid into court at Sheffield, and not in London; and further that the £40 was not paid into court in London till after the time given by the registrar had expired.

For the defendant it was argued, that the proceedings being under the Bills of Exchange Act, the money was rightly paid into court in London; that he had entered appearance in London as well as at Sheffield; and that the delay in paying it in had arisen entirely from the difficulty of finding out where to pay it in. Order II., rule 6, was referred to.

Lindley, J.—I think the defendant has waived the objection that proceedings under the Bills of Exchange Act cannot be taken in a district registry by appearing there, and, therefore, the £40 should have been paid into court in Sheffield. Whether the objection would have been a tenable one, it is not necessary now to decide. I am disposed to give the defendant leave to defend, as there was a mistake, but as the judgment has been regularly signed, I must put him under terms.

Order to set aside the judgment and the execution on the terms following: That the defendant brings no action against the plaintiff or his solicitor or the sheriff, and pays the expenses of the execution, and pays into the Sheffield Registry £95 2s. 6d. within a week, the plaintiff consenting to the defendant's obtaining back the £40 paid into court in London. The sheriff to withdraw when the money has been paid into court; no sale in the meantime. If the money be not paid within the week, judgment to stand and execution to proceed. The defendant to pay the costs of this application.

No. CXCIV.

Atwood *v.* Miller.

Counter claim—Judicature Act, 1873, *s.* 24, *sub-s.* 2—*Judicature Act* 1875, *Order XIX., rule* 3.

This was an action for rent, in which the defendant set off the price of butcher's meat delivered, and had also a counter claim for damages as tenants from year to year of the plaintiff, and for specific performance of an agreement to grant a lease. The Master had refused to strike out the counter claim, and that decision was now appealed against.

Wardlow, for the plaintiff.—This is a simple claim for two years and three quarters rent under a written agreement. The defendant has admitted that the rent is due, and the only real question in the action is whether we owe him a butcher's bill. Nothing has been done under the agreement of which he sets up specific performance, and therefore it would not be granted him. In any case, specific performance would not be ordered in this division, and the cause would have to be transferred to the Chancery Division. I admit that the question is one entirely in your Lordship's discretion; but I submit that this is an embarrassing counter claim, and should therefore be struck out.

F. Turner, for the defendant.—The counter claim is not simply for specific performance; it is also for damages for non-performance of the conditions in the agreement to let. The plaintiff let us premises with certain easements attached, and has shut us out from the enjoyment of them; and for this we claim damages. Any division of the High Court can grant specific performance under sect. 24 of the Act of 1873, sub-sect. 2. Why should there be two proceedings when everything can be decided in one? We have a right to set up two distinct claims—one for damages as tenants from year to year, and the other for specific performance of an agreement.

Lindley, J.—At first sight it appeared doubtful whether the defendant could conveniently make both these claims together, and I was inclined to think that the claim for specific performance should be postponed, and tried separately. But I do not think that is necessary. I cannot hold that this counter claim is sufficiently embarrassing to be struck out, and I think if I were to do so, I should be acting against the spirit of the Act.

No order.

No. CXCV.

Atkins *v.* Taylor.

Judicature Act 1875, *Order XIV., rule* 1; *Order XIX., rule* 2; *Order XXI., rule* 4; *Order XXII., rule* 3; *Order XXIX., rule* 2 *—Specially indorsed writ—Notice in lieu of statement—Judgment signed in default of statement of defence.*

This was an appeal from the order of the District Registrar of

Birmingham setting aside judgment. The writ had been specially indorsed under Order XIV., rule 1; and the plaintiff had applied to the district registrar for leave to sign judgment, which application the defendant had successfully opposed. No further step was taken by either side until the plaintiff applied to the district registrar for leave to sign judgment under Order XXIX., rule 2, as no statement of defence had been delivered. This application was granted, but the defendant subsequently obtained an order from the registrar setting aside the judgment on the ground that no statement of claim had been delivered.

Channell for the plaintiff.—The plaintiff filed an affidavit verifying the indorsement on his writ, when the application was made to the registrar for leave to sign judgment; and no statement of claim is necessary where the writ is specially indorsed. As there was a misapprehension, I cannot ask for judgment, but as the judgment was regularly signed, the defendant should be put under terms. What we really wish to know now is who is to take the next step, as we have come to a dead lock.

Butterworth for the defendant.—No notice was given by the defendant that he dispensed with a statement of claim; and the plaintiff was bound to give the notice that his claim was as on writ, according to Order XXI., rule 4.

LINDLEY, J.—It cannot be necessary to deliver any statement of claim where the writ is specially indorsed. Order XIX., rule 2, and Order XXI., rule 4, are general rules, and Order XXII., rule 3, is a special rule, and therefore to be followed. I think, according to the true construction of the Act, the judgment was regular. I will set aside the judgment, however, and order the defendant to deliver a statement of defence in eight days. Costs to be costs in the cause.

No. CXCVI.

YOUNG *v.* KING.

Transfer of cause—Judicature Act 1873, *s.* 35 s. 24, sub-s. 5.

AN application was made to stay proceedings in this action, or to send it over to the Rolls Division, where an action of ejectment (*King* v. *Young*) had been commenced. The action was by a mortgagee to be let into possession.

Eyre for the plaintiff.

F. Turner for the defendant.

Case transferred to the Rolls, with liberty to the plaintiff to apply for possession.

Costs in the cause.

Saturday, Jan. 8.

(Before ARCHIBALD, J.)

No. CXCVII.

Interrogatories—Judicature Act 1875, *Order XXXI., rule* 1.

THIS was an action for damages for breach of contract in not taking fruit, and for the price of the fruit. The defendant now applied for an order to administer interrogatories before the delivery of a statement of defence. He wished to interrogate as to the weight of fruit sold. The statement of claim gave the number of pots of fruit sold.

ARCHIBALD, J.—The defendant does not want these interrogatories at all; the plaintiff's case is that the fruit was sold by pots. If the defendant's case is that the fruit was sold by weight he can set that up in his statement.

No order.

No. CXCVIII.

Discovery—Judicature Act 1875, *Order XXXI., rule* 12.

THIS was an action of ejectment by the owner of a vicarage house, and discovery was now applied for by the plaintiff. In his statement of claim he said he was inducted on the 28th Oct., and that he then became entitled to enter the vicarage house. Defendant in his statement of defence asserted that he was tenant from year to year; and the plaintiff desired to see the agreement on which the tenancy was founded. The defendant objected to give discovery, on the ground that the application was too late, issue having been joined.

Order for discovery.

No. CXCIX.

CARTER *v.* LEEDS DAILY NEWS COMPANY AND JACKSON.

Interrogatories—Judicature Act 1875, *Order XXXI., rules* 4, 5.

THIS was an action of libel, and the defendants now applied to strike out interrogatories that had been delivered.

Tennant (for the defendant company).—These interrogatories have been delivered to us without an order, in violation of Order XXXI., rule 4. I therefore ask that, as regards us, they may be struck out.

Lumley Smith (for the defendant Jackson) cited *Wilton* v. *Brignell* (No. CXXIX., *ante*, p. 56), and *Pitten* v. *Chatterburg* (No. CXLI., *ante*, p. 62).

Crompton (for the plaintiff) cited *Ramsden* v. *Brearley* (33 L. T. Rep. J. Ch. 322).

The following were the interrogatories that had been delivered:

Interrogatories on the part of the plaintiff, to be answered by an officer

of the Leeds Daily News Company (Limited), and by the defendant, William Lauries Jackson.

1. Is the defendant, William Lauries Jackson, the editor or publisher of the *Leeds Daily News*, and what position does he occupy in respect of the said newspaper?

2. Is William Lauries Jackson a shareholder in the said company?

3. Is it the duty of the said William Lauries Jackson to exercise a supervision over paragraphs of the nature of those set out in the statement of claim?

4. Did the said William Lauries Jackson write, or have anything to do with the writing of, any and which of the paragraphs mentioned in the statement of claim; and, if not, who was the writer of such paragraphs, and of each of them?

5. Did the said William Lauries Jackson see any and which of the said paragraphs before they were inserted in the newspaper or before the newspaper was published or circulated, and did he sanction the publication of the said paragraphs, or of any and which of them?

6. By whom, and in what way, were the said paragraphs brought to the office of the Newspaper Company, or by anyone else, and whom on their account, at one time, and, if not, when they were received?

7. Were the numbers of the *Leeds Daily News* of the 13th August 1875, 19th August 1875, 10th Sept. 1875, and the number of the *Leeds Daily News* containing the paragraph commencing with the word "Query," printed and published by the Leeds Daily News Company (Limited) or by the defendant William Lauries Jackson, or by both of them?

8. Has the said company, or has the said William Lauries Jackson, or have they at any time, and when, had in their or his possession or control, the original writings of the paragraphs mentioned in the statement of claim, or any letters or documents original, or copies relating to the matter mentioned in the said paragraphs or to the subject matter of this action?

9. Have you any and what objections to the production, inspection, and copying of any and which of the said writings and documents, and where and in whose possession and control are they now?

ARCHIBALD, J.—As regards the first interrogatory, I can only allow the plaintiff to ask whether Jackson is the publisher. He cannot be asked whether he is the editor. I will allow the second and third. The fourth and fifth must be struck out. The sixth and seventh allowed. The eighth and ninth struck out.

All the interrogatories struck out as regards the company.

Monday, Jan. 10.

(Before LINDLEY, J.)

No. CC.

Signing judgment on specially indorsed writ—Judicature Act 1873, *s.* 22—*Judicature Act* 1875, *Order XIV., rule* 1.

THIS was an action on two promissory notes that were over due and unpaid. An application had been made to sign judgment under Order XIV., rule 1, on a writ issued in September, the

indorsement on which was similar to what it would now be under Order III., rule 6, and had been refused by a master; and, on appeal to the judge, the case had been adjourned to see if the defendant could make an affidavit showing a good defence. The adjourned summons now came on, and the defendant produced no affidavit. For the defendant, decisions of Mr. Justice Quain were relied on, refusing to allow judgment to be signed under similar circumstance; for the plaintiff, a decision of Baron Huddleston's (No. CLXIV., *ante*, p. 74), was referred to.

LINDLEY, J.—If the defendant could have produced an affidavit that he had a good defence, this point need not have been decided. But as no affidavit has been filed, I must assume that there is no substantial defence to the action. It is quite clear that I could not allow judgment to be signed upon this writ, if it were not for sect. 22 of the Act of 1873; but I think that gives me power to do so. But I think the court should decide whether that is so; and I shall give the defendant time to appeal. Order for judgment to be signed, but no execution to issue within ten days.

No. CCI.

MOORHOUSE *v.* COLVILLE.

Judicature Act 1875, *Order XXVII., rule* 1—*Amendment of claim.*

THIS was an action for unlawful distress. Master Dodgson had ordered the statement of claim to be struck out; and that order was now appealed against.

R. Williams for the plaintiff, contended that the only objection to the statement of claim was that it was prolix, which was only a matter of costs.

A. L. Smith for the defendant.

LINDLEY, J.—This statement is not only prolix, it is obscure. But I will give the plaintiff an opportunity of seeing whether he cannot amend the claim. "Or amended" to be added to Master's order. Costs of this application to be defendant's.

No. CCII.

Injunction—Judicature Act 1873, *s.* 25, *sub-s.* 8.

An *ex parte* application was made for an injunction to restrain a distress for rent. It was stated that a condition precedent to the landlord's right to rent was that he should put the house in repair. The applicant had commenced an action on this agreement of the landlord, in which they claimed £150. He was willing to pay the amount of the distress into court.

LINDLEY, J.—*Primâ facie*, an injunction ought not to be granted *ex parte*. In cases of emergency it will be granted; but an injunction is very rarely given without hearing both sides. You

must serve the other side with a notice that you intend to apply for an injunction on a given day.

Tuesday, Jan. 11.

No. CCIII.

Transfer from County Court—Judicature Act 1873, *sect.* 90.

An *ex parte* application was made to transfer all proceedings from a County Court. The applicant was directed to proceed by summons, a stay of proceedings in the County Court in the meantime being granted.

No. CCIV.

Voysey *v.* Cox.

Interrogatories—Judicature Act 1875, *Order XXXI, rules* 5, 8.

On a summons to strike out interrogatories in this case, the point arose as to the proper method of taking an objection to answer; whether it might be taken under rule 5 or rule 8 of Order XXXI. indifferently.

Lindley, J.—There was a rule in equity, that if you answered at all you must answer fully; and it is quite plain to me that rule 8 was intended to do away with that difficulty. Speaking generally, I should say that the proper method of taking objection to an interrogatory as bad in substance is to apply to strike it out, under rule 5; and that the proper method of taking an objection to an interrogatory not bad in itself, but which there are special reasons for objecting to answer, is in the affidavit in answer, under rule 8.

Monday, Jan. 10.

No. CCV.

Broadhurst *v.* Willey.

Application to deprive plaintiff of costs—Payment into court—Judicature Act 1875, *Orders XXX., LV.*

This was an action in the County Court, and there was now an appeal from the master as to costs. The defendant had purchased wool to the value of £500 odd, and he paid nearly the whole price before receiving the goods. The question between the parties was whether the remaining balance due was £33 or £43. The defendant sent a cheque for £33 to the plaintiff, which was returned. The plaintiff's solicitor then sent a letter to the defendant, asking

for £43. In reply, the defendant offered to pay the £33, and try the question as to the £10 in the County Court. This the plaintiff declined to accept, and served a writ for £43 upon the defendant. The defendant paid £33 into court, and the plaintiff took it out in satisfaction of the entire cause of action. For the defendant it was now asked that the plaintiff should not have the costs of the action, and it was contended that Order LV. gave the Judge a discretion in the matter. For the plaintiff, it was contended that there was no discretion as to costs in these cases, and that the master had acted in accordance with Order XXX., and also in accordance with the practice before the Judicature Acts. The Judge took time to consider the question, and to-day gave judgment.

LINDLEY, J.—The true construction of Order XXX., rule 4, and Order LV., is that Order XXX., rule 4, is subject to Order LV., and the effect of the two rules is that, in cases falling within Order XXX., rule 4, the plaintiff is entitled to his costs, unless there are some sufficient reasons for depriving him of them; but if there are, he can be so deprived. In this case, I am of opinion that there are sufficient reasons for depriving him of his costs; for it is plain that the writ was not required to enable the plaintiff to obtain the money paid into court, and accepted in satisfaction of the plaintiff's claim. The real dispute between the parties was as to a sum of £10, and the writ was issued to obtain this sum. The plaintiff has thought proper to abandon his claim; the writ has, therefore, served no useful purpose whatever. Under these circumstances, I think it would be unjust to compel the defendant to pay the plaintiff's costs of the action. I reverse the order of the Master, and stay proceedings, and leave each party to pay his own costs.

No. CCVI.

Order for substituted service—Injunction—Judicature Act 1873, *s.* 25, *sub-sect.* 8—*Judicature Act* 1875—*Order IX., rule* 2.

THIS was an *ex parte* application for an order for substituted service of a writ upon defendant's manager, Mackenzie, defendant being abroad. An injunction was also asked for to restrain M'Arthur, the defendant, from negotiating a bill of exchange, which had been put into his hands by the plaintiff, who was holder for value, to discount. He had not discounted the bill, and refused to return it, and it was this bill that was the subject of the action. In support of the application, it was stated that the plaintiff apprehended the defendant's presenting the bill for payment, getting the money, and going off with it. The bill was indorsed, and, therefore, negotiable. It had been in M'Arthur's hands since the 17th Dec., and would be due on the 23rd Jan. Mackenzie had stated two days previous to this application that the bill was not as yet discounted.

LINDLEY, J.—I can grant an injunction to restrain M'Arthur from receiving the money on this bill, as this is one of the cases where the application may be made *ex parte*. Of course, if notice is given of an application for an injunction to restrain anyone from negotiating a bill, the bill might be negotiated before the injunction could be obtained. But you must take care that the indorser is not discharged, which would be the effect of its not being duly presented for payment.

Order for substituted service of writ on Mackenzie. Injunction to restrain the defendant from parting with the bill before the 18th Jan.; liberty for the plaintiff, on notice to the defendant, to apply in the meantime for further order. Service of this order on Mackenzie to be good service on defendant, plaintiff undertaking to abide by any order as to damages, and to accept short notice.

Tuesday, Jan. 11.

No. CCVII.

WINTERS *v.* DABBS.

Interrogatories—Judicature Act 1875, *Order XXXI., rule* 5.

ON an application to strike out interrogatories that had been administered by a defendant to support his counter claim,

LINDLEY, J.—I think that interrogatories should only be struck out when they are objectionable or oppressive. The mere fact that they are open to criticism is not a reason for striking them out. I do not understand that it is the business of the Judge to settle interrogatories.

No order. Costs in the cause.

No. CCVIII.

JOHNSON *v.* MOFFAT.

Application to transfer to Chancery Division—Judicature Act 1873, *s.* 36.

THIS was an application to transfer the above action to the Chancery Division, on the ground that it was substantially a breach of an order made in the suit of *Moffat* v. *St. James's Bank*, pending in the Chancery Division. In that suit the following order had been made: Motion to stand until hearing, defendant undertaking to take no proceedings at law. Shortly after this order was made, a letter was sent to the defendant (the plaintiff in the Chancery suit), demanding payment of dishonoured acceptance placed in the hands of the writers by their client, Dear. This letter was sent by Rees and Co., who were Dear's solicitors. The

bill had been indorsed to Johnson, as it was suggested, for the purposes of this action. The defendant had amended his bill in Chancery, and made Johnson a defendant.

E. Cutler, for the defendant.

R. Williams, for the plaintiff.

Cause transferred to the court of Vice-Chancellor Malins, the defendant undertaking to bring the matter to a hearing.

Wednesday, Jan. 12.

CCIX.

Costs—Schedule to Order VI. of the Additional Rules of Court of 12th Aug., Judicature Act 1875.

An application was made on appeal from a decision of Master Johnson's as to costs. The applicant stated that all the Masters of the Exchequer Division agreed with Master Johnson, but that all the masters of the other divisions were of a contrary opinion. The decision in question was as to whether the sum of 3s. allowed in the schedule as to costs of the Act of 1875, for a summons to attend at Judges' Chambers, included the allowance subsequently mentioned, as to summons to attend at the Judges' Chambers, for each copy to serve, 1s. Master Johnson had considered that the 3s. must include the court fees, as the note just above that allowance expressly stated that the preceding allowances did not include the court fees.

Lindley, J., took time to consider the question, and subsequently reversed the decision of the master.

No. CCX.

Discovery—Judicature Act 1875, *Order XXXI., rule* 12.

On an application for an order for discovery of documents, an objection was taken that the action was one of ejectment, and that the applicant named no document of which he sought discovery.

Lindley, J.—You can protect yourself in your affidavit with regard to any documents for which you claim privilege.

Order.

No. CCXI.

Transfer of action—Judicature Act 1873, *s.* 36.

This was an action on a guarantee by a married woman, and leave had been obtained to amend the indorsement on the writ, so as to charge her separate estate. It was now desired to transfer the

action to the Chancery division, in order to obtain an order against her separate estate.

Order to transfer the action from the Queen's Bench Division to the Chancery Division (Hall, V.C.); costs in the Queen's Bench and costs of this application to be disposed of by the Vice-Chancellor.

No. CCXII.

SIVIER *v.* HARRIS.

Interrogatories—Judicature Act 1875, *Order XXXI., rule* 5.

THIS was an action against an auctioneer for the price of a horse, that had been sold by him for the plaintiff. The defence was one of fraud, and was, that the plaintiff had represented the horse to be quiet and a good worker, well knowing it not to be so, and that the auctioneer had represented this to one Coulson, the purchaser.

An application was now made to strike out interrogatories that had been delivered by the defendant to the plaintiff.

The two following interrogatories were ordered to be struck out: 2. Was the horse, which is the subject of this action the property of the plaintiff at the time of the sale? 3. If it was your property, how did it become so?

No. CCXIII.

Interrogatories—Judicature Act 1875, *Order XXXI., rule* 5.

IN an action for breach of promise of marriage, interrogatories administered by the plaintiff to prove mere expectations of means by defendant, as to the means of his relations, and as to any settlement made by them on defendant's present wife, were struck out.

No. CCXIV.

COTTON *v.* HOUSMAN.

Summons for further particulars than those indorsed on writ, Judicature Act, 1875, *Order XXI., rule* 4.

THIS was an action by a widow, as administratrix, against the solicitor of her deceased husband, who was an auctioneer. The writ was specially indorsed, and the plaintiff gave a notice that the claim was as on writ. The present summons was taken out by the defendant for a statement of claim and particulars. The master had refused the application.

Archibald, for the plaintiff, said that no further particulars of the claim could be given than those indorsed on the writ.

Will, for the defendant.

Order for the plaintiff to deliver the best particulars she can in a week; defendant to have eight days after delivery of particulars to put in his statement of defence. Summons adjourned generally.

No. CCXV.

CORMACK *v.* GROFRIAN AND ANOTHER.

Joinder of plaintiff—Judicature Act 1873, *s.* 24, *sub-sect.* 3—*Judicature Act* 1875, *Order XVI., rule* 13—*Order XIX., rule* 12—*Order XXII., rules* 5, 6.

THIS was an action by a shipowner, against two consignees of goods carried by him, for demurrage. A counter-claim had been delivered for damage to cargo. The plaintiff then took out the present summons, which was to add other parties as plaintiffs, on the ground that they were part owners, and, therefore, partly liable on the counter-claim. Master Hodgson had refused to make the order.

Webster, for the defendants.—Under Order XVI., rule 13, no plaintiff can be joined without his consent; under the old practice, that consent had to be verified by affidavit.

Witt, for the plaintiff.—The rights of the parties whom I wish to join are the same as those of the present plaintiff. This action is being brought for their benefit. Under the old system we might have been nonsuited for not joining these parties. We can no longer plead in abatement to the counter claim, and it would be very hard if, because the plaintiff brings the action alone, which he is entitled to do, we should have to meet alone a subsequent claim with regard to which other persons are liable as much as himself.

Appeal dismissed with costs.

Thursday, Jan. 13.

No. CCXVI.

STRONG *v.* TAPPIN.

Interrogatories—Judicature Act 1875, *Order XXXI, rule* 5.

THIS was an action, commenced under the Bills of Exchange Act, on five bills of exchange. Interrogatories had been delivered to the defendant, who had obtained leave to appear, but had not yet delivered a statement of defence.

W. Pike, for the defendant, said that the statement of defence, which was about to be delivered, began by admitting the plaintiff's case; so that the interrogatories, which were for the purpose of proving the plaintiff's case, were unnecessary.

F. Knight, for the plaintiff, said that Order XXXI., rule 1, said that interrogatories might be delivered at the same time as the statement of claim.

LINDLEY, J.—This is the bad practice, that used to prevail in equity, of filing interrogatories on the bill without knowing or caring what the answer will be. The plaintiff should have waited

to file interrogatories until the statement of defence had been delivered. There may be cases, as where fraud is alleged, where interrogatories may be filed before the statement of defence is delivered, but they are exceptional. I shall not do anything to encourage the revival of the old Chancery abuse.

Order for interrogatories to be struck out, without prejudice to any fresh interrogatories which the plaintiff may desire to deliver after the statement of defence.

No. CCXVII.

Judicature Act 1875—*Order LVIII., rule* 12—*Printing evidence.*

UNDER the above rule, on the application of parties, LINDLEY, J., ordered that a copy of the Judge's notes should be printed for the purposes of the appeal.

No. CCXVIII.

LEY *v.* MARSHALL.

Discovery before statement of claim—Judicature Act 1875, *Order XXXI., rule* 12.

THIS was an action for damages for breach of duty in and about the carrying of goods by sea. An application was now made by the plaintiff for an order for discovery. The statement of claim had not yet been delivered.

J. C. Mathew, for the plaintiff.—The plaintiff's case is that the ship was overladen. We could have delivered a declaration, but not a statement of claim, without discovery.

Hollams for the defendant.

Order for usual affidavit of documents relating to cause of action mentioned in the affidavit of J. H. White, within a week.

No. CCXIX.

Signing judgment on specially indorsed writ—Judicature Act, 1875, *Order XIV. rule* 1.

IN an action for £609 as commission on the sale of tea, in which leave had been obtained to serve out of the jurisdiction the specially indorsed writ, issued 4th Dec., and of which service was effected in New York on 5th Jan.,

Held, on a summons taken out on 7th Jan. to sign judgment and heard to-day, that it was a sufficient reason for not allowing judgment to be signed or ordering the defendant to pay money into court, that the defendant had not had time to communicate by post with his solicitors his instructions with reference to the summons taken out on 7th Jan. Per LINDLEY, J.

Friday, Jan. 14.

(Before POLLOCK, B.)

No. CCXX.

Signing judgment on specially indorsed writ—Judicature Act 1875, *Order XIV. rule* 1.

THIS was an appeal from the order of Master Dodgson, allowing judgment to be signed. The action was by a stockbroker for commission to the amount of £326. The defendant alleged that he had taken proceedings in bankruptcy, and that he disputed the correctness of the account delivered.

Appeal dismissed with costs.

No. CCXXI.

COMMISSIONERS OF WATERFORD *v.* VEALE, BEGG, AND EVANS. 14 / 8

Notice of indemnity—Judicature Act 1875, *Order XXII. rules* 6, 21.

THIS was an action for expenses incurred in removing wreck.

Sutton for the defendants.—We have served the Great Western Railway Company with a notice that we claim indemnity from them; they consent to come in and defend the action, and to our withdrawing.

C. Bowen, for the plaintiffs.—We object to that, unless the Great Western Railway Company admit their liability; the present defendants have done so.

Myburgh (for the Great Western Railway Company).—We are willing to admit our liability.

Order for the Great Western Railway Company to be defendants, they admitting the cause of action and their liability.

(Before LINDLEY, J.)

No. CCXXII.

Inspection—Judicature Act 1875, *Order XXXI., rule* 14—*Counter claim.*

APPLICATION was made for leave to inspect a document mentioned in the second paragraph of the statement of claim. The action was one of ejectment by mortgagees against the executors of the deceased mortgagor. The defendants desired to inspect the mortgage deed.

Mead, for the plaintiff.

F. O. Crump (for the defendants) cited *Patch* v. *Ward* (L. Rep. 1 Eq. 436), and stated that the defendants wished to know the amount of the mortgage in order to redeem.

LINDLEY, J.—I shall make no order for production, the plaintiff undertaking to give in a week a statement of principal, interest,

and amount of costs, and of the particulars of all other subsequent encumbrances. The defendant will have to make the first mortgagee and all subsequent holders of charges parties to his claim to redeem.

There was a further summons in the same case to strike out defendant's counter claim, which merely asserted a right to redeem, on the ground that it was no defence to the action.

No order.

Saturday, Jan. 15.

No. CCXXIII.

Action under Bills of Exchange Act—Application to join third party —Judicature Act 1875, *Order XVI., rule* 13.

An *ex parte* application was made for leave to add another defendant in an action under the Bills of Exchange Act. The master had refused the application on the ground that the defendant could not avail himself of the provisions of the Judicature Act at this stage. The defendant had obtained leave to appear, and a statement of claim had been delivered.

Order that the defendant be at liberty to join a third party as defendant.

No. CCXXIV.

Macdonald *v.* Bode.

Striking out counter claim—Third parties—Judicature Act 1873, *s.* 24, *sub.-s.* 3—*Judicature Act* 1875, *Order XVI., rules* 17, 18—*Order XIX., rule* 3.

This was an action on a bill of exchange, and the defendant now appealed from Master Hodgson's order, striking out the counter claim which had been delivered. The statement of defence alleged that the bill had never been indorsed by Alexander, the drawee, to the plaintiff, or, if it had been so indorsed, that there had been no consideration for such indorsement, and that it was held by the plaintiff solely as trustee for Alexander. The set-off and counter claim alleged that Alexander and the defendant were jointly engaged to act for a company, and that they agreed that the commission which they should receive for their services was to be equally divided between them, and that Alexander fraudulently refused to account for commission he had received.

Foord for the plaintiff.—That Macdonald is a trustee for Alexander is a mere allegation; they do not show that it is true. This is not a claim within the action. There must be a distinct and specific claim; and here there is no distinct claim.

Kelly for the defendant.

Lindley, J.—From Order XVI., rules 17, 18, it would appear

that to bring in a third party, the defendant's claim against him must be in the action. But sect. 24, sub-sect. 3, of the Act of 1873, gives a wider power. Supposing Alexander was the plaintiff, the set-off would be certainly good. Then they allege that Alexander is the real plaintiff. As they raise the defence that Macdonald is trustee for Alexander, I shall allow them to set up this counter-claim and set-off.

Order of Master rescinded. Costs in the cause.

No. CCXXV.

LACEY *v.* WIELAND.

Interpleader before action—Judicature Act 1873, *sect.* 25, *sub-s.* 6.

Shiress Will for the defendant.—An award has been given against us, and judgment signed by Lacey, the present plaintiff. We are quite ready to pay, but two claims have been made upon the judgment debt. Notice in writing of an assignment has been given us, and Lacey has become bankrupt, and the assignee under his bankruptcy claims the money. It is right to say that an appeal, on Lacey's part, is pending against the order of bankruptcy.

Order that the defendant be at liberty to pay the money into court, less his costs to be taxed. Proceedings as against defendant to be stayed.

No. CCXXVI.

COOP AND OTHERS *v.* INCE HALL COMPANY.

Inspection of property—Judicature Act 1875, *Order LII., rule* 3.

THIS was an action of trespass between adjoining colliery proprietors; the plaintiffs now applied for an order for inspection of defendants' mine, and, for that purpose, for the removal of barriers erected by the defendants between the mines, or for liberty to go down into the defendants' mine and for liberty to take measurements, samples, &c.

Myburgh, for the plaintiffs.—We want to inspect their mine, in order to see how far they have trespassed upon our ground, and how much of our coal has been taken away.

Gully, for the defendants.—The whole question between us is where the boundary is. This rule was never intended to enable a colliery proprietor to get an inspection of his neighbour's mine by a mere allegation of trespass. Our colliery covers 800 acres, and theirs about seven acres. The affidavit of defendants' manager states that it is most important for reasons apart from this action that the working of defendants' mines should not be seen by the plaintiffs.

LINDLEY, J.—An order for inspection of this kind is so common in Chancery that I should have thought this was a matter of course. My impression is that the plaintiffs are entitled, almost

as a matter of course, to inspect the defendants' mines about the alleged boundaries; but that if the defendants can suggest any method by which that can be done without the plaintiff seeing the whole of their mines, they are entitled to have the inspection so limited. I shall make no order as to removing barriers, or as to taking samples.

Order to inspect the mine and workings of the defendants under and near the plaintiff's mines as delineated or described, and to measure the coal taken away from under the plaintiff's lands. Two days' notice of inspection to be given. Inspection to be made through the pits of defendants, unless other access is provided. No notice to inspect for a week. Costs of this application to be costs in the cause. Statement of claim to be delivered a week after inspection.

Monday, Jan. 17.

(Before LINDLEY, J.)

No. CCXXVII.

Discovery—Judicature Act 1875, *Order XXXI., rule* 12.

AN application being made for discovery of documents, it was objected that the applicant named no document in his opponent's possession.

LINDLEY, J.—That is an exploded doctrine. He is entitled to discovery as a matter of course, unless you can make out an objection to his having it. The onus is on you. He cannot know what documents you have until he gets your affidavit.

No. CCXXVIII.

Striking out claim—Judicature Act 1875, *Order XXVII., rule* 1.

IN an action of trespass, an application was made to strike out the statement of claim. The writ was issued in June, and Master Dodgson had ordered a statement of claim to be filed within eight days. The plaintiff then served a copy of the indorsement on the writ as a statement of claim. The defendant now contended that this was no statement of claim.

LINDLEY, J.—It is an informal statement, but it need not be struck out.

Statement to be amended in a week, otherwise order. Costs in the cause.

No. CCXXIX.

PRESTON AND OTHERS *v.* LAMONT, REUBIN, AND RODGER.

Service out of the jurisdiction—Judicature Act 1875, *Order XI., rule* 1.

THIS was an *ex parte* application for leave to serve out of the jurisdiction, on appeal from Master Walton.

C. Dodd, in support of the application.—We want to serve the defendant in Scotland. The terms of the contract were that the money should be sent direct to the plaintiff, who resides at Deptford. The money has not been sent.

LINDLEY, J.—That is a breach within the jurisdiction.

Order, Master's decision reversed.

No. CCXXX.

BARNICOT *v.* HANN AND CROSS.

Amendment of pleadings—Judicature Act 1875, *Order XXVII., rule* 1.

THIS was an action for money lent. A summons had been taken out by the plaintiff to strike out the statement of defence.

Wilberforce for the plaintiff.—The statement of defence contains four distinct and inconsistent allegations, namely, that the plaintiff never lent the money; that, if he did, he lent it to somebody else; that the defendant had paid the money; and that the plaintiff had released the defendant. This is the old form of pleading, which the Judicature Act has abolished.

Witt for the defendant.

LINDLEY, J.—Where the old form of pleading is applicable, there is no objection to it. A defendant is entitled to say that he never was lent the money, and that, if he was, he has paid it, or been released. No order.

No. CCXXXI.

Leave to plead and demur—Judicature Act 1875, *Order XXVIII., rule* 5.

AN application having been made to a district registrar for leave to plead and demur—the ground of demurrer being that the statement of claim disclosed no cause of action—and having been refused.

LINDLEY, J., reversed that decision, and made the order.

Moulton for the plaintiff.

Anstie for the defendant.

Tuesday, Jan. 18.

No. CCXXXII.

Dismissing action for want of prosecution—Judicature Act 1875, *Order XXIX., rule* 1.

THIS was an appeal from a master's decision, refusing to dismiss an action for want of prosecution. The action was on a bill of

exchange, and the writ was served in August last. Leave to appear was obtained on August 12, and notice of appearance sent to the plaintiff on the following day. Nothing had since been done. On behalf of the defendant it was stated that as he had been paid by the acceptor he had not gone on against the indorser, and that the indorser had given him a cheque for the amount, which on endeavouring to cash was found to be stopped. On behalf of the defendant, it was argued, that under the old procedure a notice to deliver the declaration in four days could have been delivered, and if not complied with, judgment signed for amount of claim and costs; that the money paid was paid in a different action, and that the present defendant had paid nothing; that he gave a cheque for the amount of the bill to the plaintiff on the condition that it should not be cashed if the plaintiff recovered from the acceptor; and that the plaintiff should not have issued two writs, one against the indorser and another against the acceptor; both should have been included in one writ.

LINDLEY, J.—I shall certainly not let the action go on simply to determine who is to pay the costs. All further proceedings in the action to be stayed; the defendant to pay the costs of the writ.

No. CCXXXIII.

Injunction—Judicature Act 1873, *sect.* 25. sub-s. 8

THIS was an *ex parte* application for an interim injunction in an action on a bill of exchange.

Moulton, for the plaintiff, said that he was applying *ex parte*, but that notice of this application had been given that day to the other side. It was desired to restrain the defendant from negotiating a bill of exchange obtained without any consideration, until the action.

Order to restrain defendant from parting with the bill before judgment in action or further order, plaintiff undertaking to abide by any order the court may make as to damages, and to accept one day's notice of any application the defendant may make to dissolve the injunction.

No. CCXXXIV.

NICHOLSON *v.* JACKSON.

Counter-claim—Judicature Act 1875, *Order XXII., rule* 9.

THIS was an application to strike out a counter-claim in the above action, which was for libel. The alleged libel was contained in a circular letter published by defendant among the shareholders of the Haune Colliery Company (Limited). The plaintiff was one of the directors of the company, who were charged in the letter with conspiracy and fraud. The defence was that the communications were privileged, and there was a counter-claim for damages

for loss sustained in respect of shares bought on false representations.

Forbes, for the plaintiff.—The plaintiff alone is not responsible on this counter-claim, but the other directors also. The action for libel is a simple one; the counter-claim will be long and involved. The libel is a very gross one, and this counter-claim must prejudice the plaintiff.

Underhill, for the defendant.—If we have really been induced to buy shares by their fraud, it would be absurd that they should be allowed to bring an action of libel against us, and perhaps recover damages, merely because we cannot technically justify.

LINDLEY, J.—This is one of those cases where it would be very difficult to keep the jury from mixing up the two claims. Order to strike out counter-claim, without prejudice to any action the defendant may bring, and on the terms that the plaintiff in this action shall not issue execution on any judgment he may obtain without leave of a court or a judge. Costs in the cause.

In this case, under the provisions of the new scale of costs, a special allowance of £1 1s. was made to the solicitor on each side.

No. CCXXXV.

Discovery—Judicature Act 1875, *Order XXXI., rule* 12.

AN application was made for further discovery of documents. The defendant's affidavit stated that he had no documents in his power, possession, or control. It appeared that the defendant was a bankrupt, and that all his books and papers had been handed over to the trustee.

LINDLEY, J.—The defendant must state what documents passed from him to the trustee, and the fact of their so passing.

Order for further affidavit within a week, as to documents that have been in defendant's power, possession, or control.

Wednesday, Jan. 19.

CCXXXVI.

HOPE *v.* BANKS.

Amendment of pleadings—Judicature Act 1875, *Order XXVII., rule* 1.

THIS was an action for an alleged breach of an agreement to take a house. The plaintiff was to have assigned his lease to the defendant, and had written naming a day upon which he could give up possession; but before the day named his wife became ill, and he wrote to the defendant saying he should be unable to give possession on that day. The defendant then took another house;

and shortly after having done so received a letter from the plaintiff, offering to give possession in three weeks. The plaintiff, in his statement of claim, had set out certain of the letters between the parties, and alleged that they contained a contract on the part of the defendant to take an assignment of plaintiff's lease.

Grantham had applied to the master, and now appealed to the Judge, to strike out this statement of claim as embarrassing, and as not setting out the facts on which the plaintiff relied.

Macleod, for the plaintiff.

Appeal dismissed with costs.

No. CCXXXVII.

Injunction.—Judicature Act 1873, *sect.* 25, *sub-sect.* 8.

AN *ex parte* application was made for an injunction to restrain the defendant in an action of trespass from continuiug his trespasses. It was stated in the plaintiff's affidavit that the defendant had destroyed the grass on part of plaintiff's land by driving a horse and cart over it.

LINDLEY, J.—I never heard of an injunction to restrain a man from trespassing on land with a horse and cart. Injunctions are not ordinarily granted for mere trespass, unless serious injury is threatened to the property. This affidavit speaks of an injury that has been done. You can serve the defendant with notice, if you like, and apply again; but I do not advise that course, as I think you will not get an injunction.

No. CCXXXVIII.

SOUTHWELL *v.* ROWDITCH.

Stay of proceedings—Judicature Act 1875, *Order LVIII., rule* 16.

THIS was an application for a stay of proceedings for the purpose of an appeal.

Aspland, for the plaintiff.—As an appeal is now no stay of execution, I ask that the defendant pay 330*l.* into court; and also that he pay the costs of this summons, and be under terms to give notice of appeal within fourteen days; otherwise no stay.

Lumley Smith, for the defendant.—I object to being ordered to pay the money into court. This is an action between two merchants, and there is no suggestion of insolvency against the defendant. The action is brought on the technicalities of a bought note.

LINDLEY, J.—I shall not order the money to be paid into court.

Order for stay of proceedings, notice of appeal to be given within fourteen days; costs of this application to be plaintiff's.

Thursday, Jan. 20.

No. CCXXXIX.

BILLING *v.* NICHOLSON.

County Court appeal.—County Courts Act 1875, *sect.* 6.—*Judicature Act* 1873, *sect.* 45.

Wheeler moved *ex parte* for a rule *nisi* in this case, calling upon the other side to show cause why the decision of the County Court Judge in their favour should not be reversed. The Judges of the Divisional Court were appointed, but the court not yet constituted. Brett, J., had directed this application to a Judge at Chambers.

LINDLEY, J.—I think the better course now is to extend the time for moving until such time as the Divisional Court shall sit to hear appeals.

Order accordingly.

No. CCXL.

LEATHLEY (on behalf of himself and all others the underwriters, &c.) *v.* MACANDREW AND ANOTHER.

Agreement to refer—Undisclosed plaintiffs—Judicature Act 1875, *Order XVI., rule* 9.

THIS was an application to stay the above action on the ground of an agreement to refer.

J. C. Mathew for the defendants.—Leathley is bound by an agreement to refer. I am willing to admit that we contracted personally, but not that we are owners.

Butterworth, for the plaintiffs.—The other plaintiffs are not bound, who were not parties to the agreement to refer. If the defendants admit that they are owners, then we do not object to the reference. If they admit their ownership, then of course they are liable to us in this action.

LINDLEY, J.—This form of action is familiar to Chancery practitioners, and it has always been held that a defence to the plaintiff on the record is a defence to the suit. I do not think the personal liability of the plaintiffs on the agreement to refer is quite the question. If the defendants do not admit ownership there is a question for the jury, and the agreement to refer does not apply.

No order, unless the defendants admit that they were owners of *The Cid*; if they do, order with liberty to apply to settle terms of reference. Costs in the cause.

Friday, Jan. 21.

No. CCXLI.

Interrogatories—Judicature Act 1875, *Order XXXI., rule* 5.

An application was made to strike out forty-five interrogatories, as irrelevant, delivered by the defendant, in an action of ejectment by a mortgagee against a mortgagor.

Lindley, J.—Interrogatories must have some connection with the pleadings. I shall strike these out on the general ground that they have nothing to do with the matter in question as it appears on the pleadings. Interrogatories to be struck out, without prejudice to any fresh interrogatories the defendant may be advised to deliver. Costs to be plaintiff's in any event.

No. CCXLII.

Lereculey *v.* Harrison and others.

Joinder of defendant—Judicature Act 1875, *Order XVI., rules* 13, 17, 18, 19.

This was an action by a merchant against solicitors for negligence. The defence was that the negligence, if any, was one W. Andrew Kilby's, whom the defendants had instructed. Master Manley Smith had made an order, joining W. Andrew Kilby as a defendant in the action, and the plaintiff appealed against this order.

Horne Payne for the plaintiff.—The defendants do not apply, as they might have done, under rules 17, 18, 19 of Order XVI., in which case notice must have been given to the third party from whom they claimed indemnity; but they apply under rule 13 of that order. *Williams* v. *Andrews* (No. CXVI., *ante*, p. 50) and *Smith* v. *Haseltine* (No. CLIII., *ante*, p. 68) are the only two cases I have found where this rule has been applied; and in those cases the circumstances are quite different to those in this case. The rule was probably intended to meet any difficulty which might arise from the abolition of pleas in abatement. The Master has now ordered us to sue a defendant, whose liability we do not recognise.

Bullen, for the defendants.—We say that Kilby is the party who is really liable. We admit retainer by the plaintiff, but we say that with his consent our managing clerk put the matter in Kilby's hands. I submit that one of the objects of rule 13 was to meet the difficulty of not being able to put in evidence at the trial everything that was material, through persons who were connected with the matters in question not being joined. If we had served Kilby with a notice of indemnity under rule 18, he need not have made himself a party to the action unless he chose to do so; and if he chose not to put in an appearance, the essential part of our

evidence would have been shut out. If it should turn out that the joinder of Kilby was unnecessary or unreasonable, the costs occasioned by such joinder will fall upon us.

LINDLEY, J.—I think that this application is not within rule 13 of Order XVI., and that the master was mistaken.

Defendant Kilby to be struck out; decision of master reversed.

No. CCXLIII.

MCCORQUODALE *v.* BELL AND ANOTHER.

Interrogatories—Judicature Act 1875, *Order XXXI., rule* 1.

THIS was an action for improper tender; issue had been joined, and an order was now applied for by the plaintiff to deliver interrogatories.

English Harrison, for the plaintiff.—Our case is that the defendants improperly got hold of our tender for stationery to the Great Western Railway Company, and then altered their tender so as to make it lower. We allege that the defendants and one Becket maliciously conspired together for that purpose. The interrogatories go to prove that the defendants, Becket, and Sydenham, a clerk of the Great Western Railway Company, were in the room together when this took place, and as to what occurred. As they have denied our allegations, we are entitled to ask them questions to prove them.

J. Francis, for the defendants.—My objection to these interrogatories is that they tend to implicate other persons than the defendants.

LINDLEY J.—I think that, under the circumstances of the defendants having denied this charge, the plaintiff is entitled to put these interrogatories.

Order.

No. CCXLIV.

Stay of proceedings—Judicature Act 1873, *s.* 24, *sub-s.* 5.

THIS was an application to stay proceedings in an action on two solicitors' bills of costs. The writ had been issued on Oct. 21, declaration Oct. 30, statement of defence Nov. 10, reply Nov. 27. A summons had been taken out now in the Rolls Court for an order to tax, and it was asked to stay proceedings in the action. An objection was taken that the application had been delayed too long; but, on the defendant agreeing to withdraw all his defence except as to the costs being taxed,

LINDLEY, J., said that he would make the order, putting the plaintiff in the same position as he would have been in, if the defendant had made this application promptly.

Order to stay all further proceedings in the action. The defendant to pay the plaintiff's costs of the action subsequent to the

writ up to the present time, including the costs of this application; defendant undertaking to obtain an order to tax with all practicable speed.

No. CCXLV.

Answers to interrogatories — Judicature Act 1875, *Order XXXI., rule* 23.

An objection was taken to an answer to an interrogatory administered by the plaintiff in an action, on the ground that it stated the defence to the action as well as answering the interrogatory.

Warburton Pike, for the plaintiff.—I do not object to his putting that part of his answer which states his defence into a separate answer, because then I can object at the trial to its being read, and ask that it may be proved by witnesses. But if it remains part of another answer it renders the whole answer useless, as I cannot read part of an answer.

Bigham, for the defendant.—My friend cannot ask me to give two answers to one question.

Lindley, J.—I cannot say that the defendant must split up his answer to suit the plaintiff's convenience. I think there may arise cases where such an application would be granted; but here, I think, the latter part of the answer, which is objected to as matter of defence, is a qualification of the former part.

No order.

No. CCXLVI.

Discovery—Judicature Act 1875, *Order XXXI., rules* 12, 13, *Appendix B., Form* 9.

In the same action as the above, an objection was taken by *Warburton Pike* that the affidavit of documents filed by defendant was insufficient, as it made no mention of books, and had not followed the statutory form.

Bigham.—The form given by the Act is optional.

Lindley, J.—The statutory form is the right form, and is intended to be the common form. An affidavit of documents is intended now to be exhaustive, and the form given in the Act is so.

Order for better affidavit of documents.

Saturday, Jan. 22.

No. CCXLVII.

Discontinuance—Judicature Act 1875, *Order XXIII.*

This was an application by a defendant to vary an order of Master Walton, staying an action on payment of costs. It was contended

that he had no power to make such an order, and that the summons, the wording of which the order followed, was misconceived, as it followed the old practice. It was further contended that this order would enable the plaintiff to go on with the action subsequently, and that the defendant had now a right to be put in the same position as if he had a judgment in his favour.

LINDLEY, J.—It seems to me to be very immaterial; but I will vary the order by substituting the word "discontinued" for "stayed."

No. CCXLVIII.

BECK *v.* DEAR.

Joinder of plaintiff—Judicature Act 1875—*Order XVI., rule* 13.

THIS was an action by an auctioneer, for his commission on goods sold.

R. Williams, for the defendant.—A company built a large hotel, which Dear furnished; the company has been wound-up, and the furniture has been sold by auction by agreement of all parties. The auctioneer has brought this action against us, and we have a claim against the official liquidator of the company in respect of an alleged property in half the furniture. We say that the auctioneer sold for the liquidator. We wish the official liquidator to be joined as a plaintiff, that we may bring our counter-claim, which arises out of the same matter, against him, and have it decided in this action.

Bullen, for plaintiff.

No order. Costs to be plaintiff's in any event.

No. CCXLIX.

STORER *v.* SIMMONS AND OTHERS.

Cross-examining defendant—Judicature Act, Order XXXVII., rules 2, 4.

THIS was an issue directed by Master Dodgson, between a judgment ~~debtor and a judgment~~ creditor and garnishees.

Lumley Smith, for the plaintiff.—I apply now, under rules 2 and 4 of Order XXXVII., for an order against the defendants to come up and be cross-examined. Judgment has been obtained in our favour against Simmons for 1740*l.* We have obtained a garnishee order against Arnold and Lewis. In Dec. 1875, Arnold and Lewis denied that they had money owing or accruing to Simmons; they now admit 640*l.*, and deny as to the remainder. They bought Simmons' business in October 1874, for 30,000*l.*, giving a bill of sale to Simmons on the whole property. This bill of sale is still registered with no satisfaction against it. The question is whether we are not entitled to cross-examine them as to the truth of their statements, Even in an ordinary unliquidated claim,

under Order XIV., rule 3, the defendant may now be ordered to come forward and be cross-examined. The whole spirit of the Act is opposed to our being driven to trial, when an interlocutory proceeding such as this may render it unnecessary.

F. Knight, for the defendant.—The affidavit of the garnishees gives a perfectly natural account of the transaction. They show exactly how the money has been paid by degrees. It would be an undeserved reproach to order them to be cross-examined. As to what my friend says about being driven to trial, there will be no trial of this issue; it must be referred to an accountant.

LINDLEY, J.—It is quite obvious that there is a great difference between these persons, though they are witnesses, and ordinary witnesses; because they are not only witnesses, but you have a question to try with them, which renders this course unnecessary. The rule was inserted to meet the case of an ordinary witness, not a party to the case, against whom there would be no other power.

Appeal dismissed with costs.

No. CCL.

GOLDING *v.* THE WHARTON RAIL AND RIVER SALT COMPANY.

Amendment of pleadings—Judicature Act 1875, *Order XXVII., rule* 1.

THIS was an action for the breach of a contract to deliver as much salt as the plaintiff should require for three months. Master Manley Smith had refused to strike out several paragraphs from the statement of defence, and that decision was now appealed against. One of the paragraphs which it was desired to strike out denied the breach on the ground that the plaintiff's requisitions were unreasonable. The other paragraphs objected to stated that the contract was entered into with the plaintiff as director of a company. The contract was also set out, but there was nothing upon its face to show that the contract was other than a contract with the plaintiff personally.

F. O. Crump, for the plaintiff.—The salt was to be delivered by rail or river as the plaintiff should require. Our requisitions were for 480 tons per week. If there was any doubt as to the law, it would be right to drive me to demur. But the law is clear that the defendant should have protected himself in the contract; as he has contracted without reservation, he must either deliver what we require, or indemnify us, unless he alleges that our demands were made not for the purposes of our business, but for the purpose of defrauding him. As to the defence that the contract was with the plaintiff as a director, parol evidence will only be admitted to prove that there was no contract, and is not admissible for the purpose of varying the written contract. This paragraph of the defence raises a false issue.

J. B. Allen for the defendant.—One of the chief questions in the action will be whether the requirements made were the requirements of Golding, Davis, and Co., or of Golding personally. We say that we contracted with him in one capacity, and that he made his requisitions in another capacity.

LINDLEY, J.—There are two questions to be decided in this action; first, what is the intention of the contract? and, secondly, what is the true character of the requirements that have been made. I do not think that these paragraphs of the statement of defence are embarrassing, and I shall not strike them out.

Appeal dismissed with costs.

(Before ARCHIBALD, J.)

Saturday, Jan. 22.

No. CCLI.

Inspection of documents—Judicature Act 1875, *Order XXXI., rule* 18.

THIS was an action of trespass, and the plaintiff asked for inspection of two documents named in the pleadings. For the defendant, it was objected that he was freeholder, and these documents were his title-deeds; that the plaintiff set up a twelve years' possession, but without stating whether as tenant or freeholder; and that the defendant denied his title altogether. For the plaintiff, it was said that if these title-deeds were shown, the plaintiff might at once discontinue the action.

No order. Defendant's costs in the cause.

Monday, Jan. 24.

No. CCLII.

Application to proceed under the Judicature Acts—Judicature Act 1873, *s.* 22.

THIS was an action on a bond against a surety. The declaration was delivered on 26th Oct., and a statement of defence was afterwards delivered, which was struck out by the master, who also refused defendant's application to proceed under the Judicature Acts. The defendant's affidavit stated that he had a good equitable defence to the action.

ARCHIBALD, J.—You do not say what your equitable defence is. If you could have shown a good reason for the reform, I would have made it; but your statement of defence is very bald, and your affidavit does not supplement it.

No order. Appeal dismissed with costs.

No. CCLIII.

THE MARGATE PIER AND HARBOUR COMPANY *v.* PERRY.

Judgment in default of defence—Judicature Act 1875, *Order XIV., rule* 1; *Order XXI., rule* 4; *Order XXII., rule* 3.

AN application had been made in this case to Master Bennett for leave to sign judgment under Order XIV., rule 1; the application was refused, and the summons indorsed "No order." After the expiration of eight days, no statement of defence having been delivered, the plaintiff signed judgment for his claim. The present summons was to set aside that judgment, and it was contended that as no notice that the defendant dispensed with a statement of claim had been delivered, the plaintiff was bound to deliver such statement.

ARCHIBALD, J.—Looking at *Atkins* v. *Taylor* (No. CXCV. *ante*, p. 89), I am inclined to think that the judgment was regular. My only doubt arises from the fact of the master not having expressly given the defendant leave to defend. The rules seem to contemplate that where a plaintiff is not allowed to sign judgment under Order XIV., rule 1, express leave shall be given to the defendant to defend. But I think the indorsement "No order" is equivalent to leave to defend, no time for delivery of a statement of defence being named, and therefore brings this case within the words of rule 3 of Order XXII., "or if no time be limited, then within eight days." I shall, however, give the defendant leave to defend, and I will make the costs costs in the cause.

No. CCLIV.

Inspection of premises—Judicature Act 1875, *Order LII., rule* 3.

IN an action for obstruction of light and air, an application was made, on appeal from Master Pollock, for inspection of the plaintiff's premises by the defendant. No statement of defence had yet been delivered, and it was stated none could be until inspection had been obtained.

ARCHIBALD, J.—I must see whether your defence is that there is no obstruction, or that the plaintiff has no ancient lights. You must deliver your statement of defence before you can have inspection.

No order.

No. CCLV.

Discovery—Judicature Act 1875, *Order XXXI., rule* 12.

THIS was an action for damages for wrongfully building houses, &c., on land adjoining the plaintiff's. No statement of claim had yet been delivered. The plaintiff now applied for an order for discovery.

ARCHIBALD, J.—I think you must deliver a statement of claim

before you can have discovery, except under special circumstances. I can conceive that this might be used for very oppressive purposes; a writ might be served, and then an application of this sort made in order to fish out a case.

Adjourned till after delivery of statement of claim.

No. CCLVI.

LOVELL *v.* HOLLAND.

Joinder of defendant—Judicature Act, 1875, *Order XVI., rule* 13.

THIS was an action for mesne profits against the defendant, who had been tenant of the plaintiff's land during his incarceration in an asylum. An action of ejectment had already been successfully brought against the same defendant. The damages were assessed by the plaintiff at the rent which the defendant had been paying. The present application was on appeal from Master Hodgson by the defendant, and was that Miss Lovell, the plaintiff's sister, might be made a party to the action, and might be ordered to deliver a statement of defence in the place of the present defendant. The defendant's case was that he had paid rent to Miss Lovell, and that she had applied the money so paid to the expenses of the plaintiff's residence in the asylum.

ARCHIBALD, J.—The procedure of which the defendant wishes to avail himself rather contemplates the case of a defendant who is not liable, or who is to a great extent free from any default. Here the defendant is a trespasser. Why should the plaintiff be put to prove that any money was paid to Miss Lovell? If the defendant was led to believe that Miss Lovell was the person to whom the rent should be paid, and paid under a mistake of fact, he has a simple remedy against her for money had and received.

Appeal dismissed with costs.

No. CCLVII.

Discovery—Judicature Act 1875, *Order XXXI., rule* 12.

ON an application for discovery, it was objected that no statement of claim had yet been delivered. It was stated that the indorsement on the writ gave full particulars.

Adjourned till delivery of statement of claim.

No. CCLVIII.

Signing judgment on specially indorsed writ—Judicature Act 1875. *Order XIV., rule* 1; *Order III., rule* 6.

A MERELY formal difference (such as the misplacing of a date) between the indorsement on a writ and the form of indorsement given under Order III., rule 6, will be no answer to an application to sign judgment under Order XIV., rule 1.

Per ARCHIBALD, J. (reversing the Master's decision).

No. CCLIX.

Discovery—Judicature Act 1875, *Order XXXI., rule* 12.

THIS was an action for negligence against a railway company, and cross-summonses had been taken out for discovery. The defendant's summons asked for discovery of the plaintiff's business accounts for the past five years, and this was allowed. The plaintiff's summons asked for discovery of reports of other accidents at the same station, of documents showing number of tickets issued at the station, and of documents relating to the lighting of the station.

An order for discovery as to the two first items was refused, but made as to the last (insufficient lighting being alleged as one of the causes of the accident.)

No. CCLX.

Discovery—Judicature Act 1875, *Order XXXI., rule* 12.

AN application for discovery by a defendant, who had not yet delivered his statement of defence, and who showed no special ground for applying at this stage, was adjourned till after statement of defence, ARCHIBALD, J., stating that that was the proper time to apply, except under special circumstances, and that the order would then be given as a matter of course, unless the pleadings showed the case to be one in which discovery could not be wanted.

No. CCLXI.

Signing judgment for part of claim—Judicature Act 1875, *Order XIV., rule* 4.

UPON an application to sign judgment under Order XIV., rule 4, Master Dodgson had refused to order judgment to be signed for any part of the claim, but had ordered 100*l.*, which the defendant practically admitted, to be paid into court. The plaintiff appealed from this order.

Order that plaintiff be at liberty to sign judgment for 100*l.*, unless that sum be paid to him within a week.

No. CCLXII.

KEVERS *v.* MICHELL.

Stay of proceedings—Judicature Act 1873, *s.* 24, *sub-sect.* 5.

W. D. Rawlins, on behalf of the defendants, applied *ex parte* for a stay of proceedings in this action.—Unless we obtain this stay execution will issue to-morrow. A Chancery action is pending, brought by the defendant for an account. We are willing to pay the amount of the judgment into court.

On payment into court of 504*l.*, stay of proceedings for ten days.

No. CCLXIII.

HILL *v.* PERSSE.

County Court appeal—County Courts Act 1875, *s.* 6—*Judicature Act* 1873, s. 45.

AN *ex parte* application was made in this case for an extension of the time for appealing from the decision of the County Court Judge in this case.

ARCHIBALD, J.—This is an appeal given by statute, and there is, therefore, a difficulty with regard to extending the time. But as I have power to hear the appeal, I can treat this as a first hearing of a motion for a rule *nisi*.

Further hearing of motion adjourned till the first sitting of the Divisional Court of Appeal.

Tuesday, Jan. 25.

No. CCLXIV.

PHILLIPS AND ANOTHER *v.* BARRON AND ANOTHER.

Interrogatories—Judicature Act 1875, *Order XXXI., rule* 5.

IN an action for refusal to accept goods sold, the goods in question being patent button-fastening machines, seven interrogatories as to the French law on the subject, delivered by the defendant to the plaintiff, were struck out, Archibald, J., remarking that the plaintiff could not be regarded as an expert in French law. Two other interrogatories were also struck out, which went to prove that the plaintiffs had themselves bought the goods delivered to the defendants at a cheap price.

F. Knight, for the defendant.

Bigham, for the plaintiff.

Wednesday, Jan. 26.

No. CCXLV.

PHILLIPS *v.* HARRIS.

Signing judgment on specially indorsed writ—Judicature Act 1875, *Order XIV., rule* 1.

THIS was an appeal from the District Registrar of Monmouth, who had ordered judgment to be signed on a specially indorsed writ, unless the amount of the claim was paid into court by the defendant. The action was for £65 for the hire of a steam pump and work in putting it up.

F. A. Knight, for the defendant.—The object of that rule was to provide for cases where there was really no defence suggested. We allege that the pump provided was insufficient for the purpose for which it was expressly ordered.

A. Charles, for the plaintiff.—The district registrar acted on the affidavit of the plaintiff, and the plaintiff's bookkeeper, stating that the defendant had called and admitted his claim. The work the pump was hired for was done, and the pump then returned: (W. N. p. 294, referred to.)

ARCHIBALD, J.—To a certain extent, on these applications, the question of liability must be tried; but how far one is to try it is a nice question. The rule must not be rendered inoperative.

Appeal dismissed with costs.

No. CCLXVI.

LORD HANMER *v.* FLIGHT.

Application to sign judgment—Judicature Act 1875, *Order XIV., rule* 4.

THIS was an action for rent or for use and occupation in the alternative. Master Dodgson had refused to make any order.

C. Bowen, for the plaintiff.—The defendant does not deny that he has been in possession from Sept. 1874, to the present time; we are, therefore, entitled to sign judgment for that amount.

Beasley, for the defendant.—The defendant is charged throughout the statement of claim as assignee of the lease. His defence is that he is not assignee of the lease. The assignee of the lessor brings this action against the assignee of the lessee. We pay £24 into court for the mesne profits.

ARCHIBALD, J.—The defence set up is no answer to an action for use and occupation, which is admitted for part of the time during which the plaintiff claims.

Order of Master amended by giving liberty to the plaintiff to sign judgment for £157 10s., arrears of rent.

On the question of costs being raised, ARCHIBALD, J., following the new practice as to costs in appeals, which Mr. Justice Quain had held to apply to appeals from Masters to the Judge, gave the costs of both applications to the plaintiff.

No. CCLXVII.

FENWICK *v.* JOHNSTON.

Interrogatories—Judicature Act 1875, *Order XXXI., rule* 1.

THIS was an action on a bill of exchange, and an application was made to strike out interrogatories delivered by the plaintiff with his statement of claim. *Strong* v. *Tappin* (No. CCXVI., *ante*, p. 99,) was referred to.

Order to strike out interrogatories on the ground that they were premature, the statement of defence not having been delivered.

No. CCLXVIII.

BARTLETT *v.* ROCHE.

Amendment of pleadings—Judicature Act 1875, *Order XIX., rule* 4.

THIS was an action for money had and received for the plaintiff's use. Master Sir F. Pollock had ordered the plaintiff to amend his statement of claim by stating the circumstances under which the defendant received the £95, and when, where, and under what circumstances the account was stated between them. This order was now appealed against.

G. B. Allen, for the plaintiff, cited Order XIX., rule 4.

Beresford, for the defendant, cited forms in the Act for cases that would formerly have come under a count for money had and received.

The statement of claim was as follows:—

1. One Christopher John Mursell paid to the defendant for the use of the plaintiff £95, and the defendant had and received the said sum from the said C. J. Mursell for the use of the plaintiff.

2. The defendant with the consent of the plaintiff retained £5 as commission for his trouble, and paid to the plaintiff the sum of £45, parcel of the said £95 so received by him as aforesaid, leaving a balance of £45, which is wholly due and unpaid to the plaintiff.

The plaintiff claims £45 and interest thereon from, &c.

ARCHIBALD, J.—The only material facts in this case are that, the defendant received the money, and that he received it for the plaintiff's use. Where the old forms will serve as models, they are not necessarily abolished by the Judicature Acts. Where the defendant has received a sum of money for the plaintiff, the statement of that fact is all that can be required. The master's decision will be reversed, and, following the new practice, the whole of the costs will be the plaintiff's in any event.

Thursday, Jan. 27.

No. CCLXIX.

LAKE AND ANOTHER *v.* POOLEY.

Inspection of documents—Judicature Act 1875, *Order XXXI., rule* 14.

THIS was an action for breach of covenant in a lease. The defendant had made an assignment of one undivided moiety of leasehold property, consisting of land, brewery, and fixtures. The plaintiff now applied for an order for inspection of documents, and the defendant objected that the documents related solely to his own title.

ARCHIBALD, J.—I should not make the order if it was a distinct property; but this is an undivided moiety, the interest in which can only be realised by the usufruct of the whole property. This is an extremely complicated case, and I shall make the order and leave the defendant to appeal if so advised.

Order for inspection.

No. CCLXX.

DRAKE *v.* WHITELEY.

Interrogatories.—Judicature Act 1875, *Order XXXI., rule* 1.

THIS was an action for damages for the unskilful management of a horse and cart by defendant's servant. Interrogatories had been delivered by the plaintiff with his statement of claim, and an application was now made to strike them out.

ARCHIBALD, J.—After the decision in *Strong* v. *Tappin* (No. CCXVI., *ante*, p. 99,), these interrogatories should not have been delivered before the statement of defence, which may make them all unnecessary. Under the old system the practice of delivering useless interrogatories was very prevalent, but now it seems worse than before.

Order to strike out the interrogatories.

No. CCLXXI.

Discovery.—Judicature Act 1875, *Order XXXI., rule* 12.

ON an application being made for discovery, it appeared that the statement of claim had not been delivered, and the application was at once adjourned till after the delivery of a statement of claim.

No. CCLXXII.

COLONIAL ASSURANCE CORPORATION (LIMITED) *v.* PROSSER.

Particulars of statement of defence.

THIS was an action for slander, in which Master Sir F. Pollock had refused to make an order for particulars of the statement of defence.

Tindal Atkinson for the plaintiff.—The defendant denies that he spoke or published the words we charge him with. He then goes on to say that as agent of the Union Life Assurance Company he met with one David Lamb and others, and that all such statements as were made in conversation between them were made for the purpose of advising Lamb as to insurance. He then says that the words that were used were true. We want particulars of what passed at the conversation referred to.

Pritchard, for the defendant.

ARCHIBALD, J.—The defendant admits that he had a conversation with Lamb, but denies that he used the words the plain-

tiffs allege as slanderous; and he says further that whatever was said about the plaintiffs was true. It is wholly immaterial what those statements were.

Appeal dismissed with costs.

No. CCLXXIII.

COTCHING *v.* HANCOCK.

Interrogatories—Judicature Act 1875, *Order XXXI., rule* 1.

INTERROGATORIES delivered by the plaintiff in this case with his statement of claim, before statement of defence, were struck out. Costs to be defendant's costs in the cause.

No. CCLXXIV.

SMITH AND OTHERS *v.* WEST.

Amendment of pleadings—Judicature Act 1875, *Order XXVII., rule* 1.

THIS was an action on a guarantee, and an application was made to strike out the statement of defence. One objection to the statement of defence was that it stated that a condition precedent to defendant's liability on the guarantee was that the plaintiff should make an open and unsecured advance, and that he had not given a credit within this undertaking, without stating whether that undertaking was verbal or in writing, when made, or the parties to it. It was suggested that this would have been a violation of the rule that forbids the pleading of evidence.

ARCHIBALD, J.—There are many cases in which facts and evidence are so mixed up that they are almost undistinguishable.

Other alterations were agreed upon by counsel, and an order was made for particulars of the above paragraph of the statement of defence, and to amend as arranged by counsel.

Arbuthnot for the plaintiff.

Forbes for the defendant.

Friday, Jan. 28.

No. CCLXXV.

MENHINICK AND ANOTHER *v.* TURNER.

Amendment of pleadings—Judicature Act 1875, *Order XXVII., rule* 1.

THIS was an action on an agreement to pay 100*l.* as premium on obtaining a spirit licence. The alleged agreement was contained in a lease for three years, dated May 1871. The defence set up was that the lease was void, and that there was a second lease in substitution of it. The statement of claim set out the agreement relied upon. The master had struck out the fourth paragraph of the

statement of defence, and that decision was now appealed against. The paragraph in question stated that the agreement of 1871 had been mutually rescinded by varying its final term; that it was void as an agreement and as a lease; that a lease made in Sept. 1874 was a new, final, and conclusive contract; that the lease of 1874 was not granted upon the terms of the agreement sued on, but at a higher rent; and that, therefore, if the defendant was not before released from that agreement, he was released by that circumstance.

Bray for the plaintiff.

Foard for the defendant.

ARCHIBALD, J.—These are all points of law proper to be raised by a demurrer; they are not matters of fact. I think the master is right.

Appeal dismissed with costs.

No. CCLXXVI.

Discovery—Judicature Act 1875, *Order XXXI., rule* 12.

IN an action for the detention of a deed, the defendant's application for discovery was adjourned till after the delivery of the statement of defence.

Saturday, Jan. 29.

No. CCLXXVII.

Transfer of cause—Judicature Act 1873, *s.* 36.

THIS was an *ex parte* application by the defendant to transfer to the Chancery division an action by an auctioneer to recover money which had been paid to him as deposit by an intending purchaser, and banded over to the defendant, for whom the auctioneer was selling. The sale had not been completed through an alleged defect in the title. The defendant alleged, as matter of counter claim, that the plaintiff did not use due diligence in taking sufficient deposit money; and he had commenced an action for specific performance in the Chancery Division. It was stated that the plaintiff did not object to the transfer.

ARCHIBALD, J.—The plaintiff does not sue for money had and received, but for money lent; from which I should have supposed that he took a different view of the transaction. I do not see that this claim is mixed up with the question of title. Looking at your statement of defence, this claim appears to be perfectly distinct from your claim for specific performance. That both parties consent is not a sufficient reason for transferring a cause.

No order.

No. CCLXXVIII.

BARTHOLOMEW *v.* RAWLINGS.

Joinder of defendant—Judicature Act 1875, *Order XXII., rules* 5, 6, 9.

THIS was an action brought to recover the balance of money due on the sale of a public house. It was desired to set up a counter-claim for the return of money paid as deposit on false representations alleged to have been made by Rawlings and one Smith; and for this purpose an application had been made to Master Bennett to join Smith as a co-defendant to the counter-claim, which was refused. That decision was now appealed against.

Glyn, for the defendant.—Our answer to this claim is that the takings were warranted to be up to a certain amount, and that they were not equal to that amount. Smith was the plaintiff's broker and agent, and we allege that he made false representations to us as to the value of the business, which induced us to make the deposit.

Beard, for the ~~defendant~~ plaintiff.—Mrs. Bartholomew has made no false representations; why should she be prejudiced in her action by this counter-claim? Besides prejudicing her case, it will postpone the action, and therefore keep her longer out of this money which she alleges is owing to her. If Smith has made false representations, an action for damages can be brought against him.

ARCHIBALD, J.—There is no doubt whatever that a defendant is entitled to set up any counter-claim that is not so incongruous as to be incapable of being conveniently tried with the original claim. I think a claim for the return of deposit money on the ground of fraud may be very conveniently tried in an action for the balance of purchase-money on a sale, when the whole defence to the action is on the ground of fraudulent representation by the agent. I cannot say that these claims are of such an incongruous kind as to be unfit to be tried together. I regret that there may be some delay in the trial of the action, owing to the joinder of Smith; but that cannot be avoided.

Order to join Smith as a party to the counter-claim; and costs to be defendant's in any event.

No. CCLXXIX.

Interrogatories—Judicature Act, 1875, *Order XXXI., rule* 5.

IN the same case, an application was made to strike out the following interrogatory, delivered by the defendant to the plaintiff:—What were the monthly receipts of the business which formed the subject of the alleged agreement?

Interrogatory allowed; costs to be defendant's in any event.

No. CCLXXX.

ARMITAGE *v.* FITZWILLIAM AND OTHERS.

Judicature Act 1875, *Order XXXI., rule* 5—*Interrogatories.*

THIS was an action of fraud against the directors of a company. The defendants now applied to strike out interrogatories delivered to them by the plaintiff.

J. Rigby, for the plaintiff, took the objection that the application was too late, as more than four days had elapsed since the interrogatories were delivered.

R. E. Webster, for the defendant.—That is provided for by Order LVII., rule 6. These interrogatories were delivered with the statement of claim, and are the statement put into the form of interrogatories.

ARCHIBALD, J.—If this application had been made before the delivery of the statement of defence, these interrogatories would have been struck out as premature. As it is, they are so framed that it would be almost impossible to answer them. Why should they not be put in such a form that the defendant can answer Yes or No to them?

Order for interrogatories to be reformed. Costs to be defendant's in any event.

No. CCLXXXI.

ADERIS *v.* THRIGLEY.

Amendment of pleadings—Judicature Act 1875, *Order* XXVII., *rule* 1.

THIS was an action for malicious prosecution. Master Hod on had made an order striking out certain paragraphs from the statement of claim, and that order was now appealed against.

Moulton, for the plaintiff.—The master thought that I had set out evidence in my statement; but I submit that I have only set out the *res gestæ*. I have stated what we say does not amount to reasonable and probable cause, so that, if the defendant takes a different view, he can demur. The master treated this as a question of fact, whereas it is really a question of law. I submit that I am entitled so to state my claim as to raise the question of law.

Bullen, for the defendant.—This is an infringement of the rule against pleading evidence. I do not for a moment admit that the plaintiff is entitled to have the facts so stated as to try by demurrer, if in doing so he infringes the Act.

ARCHIBALD, J.—It would have been sufficient to have stated simply that there was no reasonable and probable cause. What is the use of stating such facts as that the plaintiff denied the charge of stealing which the defendant made against him? That is what everyone does when charged with theft. I think the master has reduced the statement within proper limits.

Appeal dismissed with costs.

No. CCLXXXII.

BARKER AND ANOTHER *v.* WOOD.

Particulars of indorsement on writ.

THIS was an action for money lent. Particulars were applied for by the defendant. No dates were indorsed upon the writ. Notice that a statement of claim was required had been served upon the plaintiff, and such statement was ready for delivery containing all dates and particulars. Master Unthank had ordered particulars, and plaintiff now appealed.

F. O. Crump, for the plaintiff.—The defendant has required a statement of claim, which is drawn, and gives full particulars. The practice here has been not to allow particulars before claim. It is putting us to the expense of another document.

ARCHIBALD, J.—I can see a great convenience in allowing particulars before the statement of claim, as the defendant may withdraw, and costs may be saved. There is one view of the Act which regards particulars as being now altogether abolished; but I think that the power to order them has not been abolished.

Appeal dismissed with costs.

Solicitor for plaintiff, *Pedley*.

Solicitors for defendant, *Gregory* and *Co.*

Monday, Jan. 31.

No. CCLXXXIII.

THE GENERAL STEAM NAVIGATION COMPANY *v.* THE LONDON AND EDINBURGH SHIPPING COMPANY.

Transfer of action—Judicature Act 1875, *Order LI., rule* 1.

AN application was made by the defendants to transfer this action to the Admiralty Division. The action was one of negligence, and arose out of a collision between the plaintiff's and the defendant's vessels in the river Thames, the former being at anchor, and the latter being steered by a pilot.

ARCHIBALD, J.—If this had been out in the high seas, and there had been questions of seamanship, of complicity, there might have been a case for transferring this action. But if I transfer this I must transfer every case of collision.

No order. Costs to be plaintiff's in any event.

No. CCLXXXIV.

Compulsory references—Judicature Act 1873, *sect.* 57—*Common Law Procedure Act* 1854, *sect.* 3.

SECT. 57 of the Act of 1873 is now practically inoperative as

regards compulsory references, no official referees having yet been appointed, and special referees being only by agreement between the parties; but the compulsory reference under sect. 3 of the Common Law Procedure Act 1854, is still in force, and therefore matters of account may be referred without consent. Per ARCHIBALD, J.

CCLXXXV.

THE NATIONAL PROVINCIAL BANK OF ENGLAND *v.* THE BRADLY BRIDGE CHARCOAL, IRON, AND FOUNDRY COMPANY.

Notice claiming indemnity from third party.—Judicature Act 1875, *Order XVI., rule* 21.

THIS was an action on a bill of exchange by the holders against the acceptors, and a notice had been served by the latter upon Hewetson, the drawer of the bill, that they claimed from him part indemnity. Hewetson had appeared pursuant to the notice, and the defendants now applied, under rule 21, of Order XVI., for directions as to future proceedings in the action.

Moulton, for the defendant.—The ground of our claim for indemnity against the drawer is the partial failure of the consideration for the acceptance. If the drawer will pay to us the amount of the failure of consideration (about 95*l.*), we will allow judgment to be signed for the whole sum.

Warburton Pike, for Hewetson.—I deny the failure of consideration. As that is now the only question in dispute, I propose that I should be substituted for the present plaintiffs, and sue the defendants on the bill.

ARCHIBALD, J.—The defendants are willing to pay the amount of the bill to the plaintiffs, less the amount of the alleged failure of consideration; Hewetson must pay the plaintiffs what will make up the whole amount due on the bill, and then can continue this action to recover the sum so paid.

Order, defendants undertaking to pay plaintiffs *l.* and interest, and on payment of the further sum of 958*l.* interest and costs by Hewetson to the plaintiffs, Hewetson to be substituted as plaintiff in this action, and to be at liberty to proceed for *l.*

Tuesday, Feb. 1.

No. CCLXXXVI.

When equity and the common law conflict, equity to prevail—Judicature Act 1873, *s.* 25, *sub-s.* 11.

ON a sheriff's interpleader summons, the claimant producing a bill of sale purporting to pass after-acquired property, it was held (following the decision of Lush, J. (*ante*, p. 19, No. XLV.)

that the principle of the common law that such an instrument was void, as a transfer of property acquired since its execution, was now abrogated, and that the sheriff seized subject to the equities—

ARCHIBALD, J., observing that he need not express any opinion as to whether such a state of the law tended to encourage fraud.

No. CCLXXXVII.

SICKLES *v.* NORRIS.

Application for an account to be taken—Judicature Act 1875, *Order XXXIII.*

THIS was an action by General Sickles upon an alleged agreement to pay him a marginal surplus upon a contract for the sale of 33,000 Remington rifles, entered into between Messrs. Norris and Remington.

C. Bowen now applied, on behalf of the plaintiff, for an account to be taken of the amount of such margin in the hands of Messrs. Norris, and stated that they had admitted a moral, if not a legal, obligation.

Horne Payne, for the defendant, referred to the note to Order 20 of the Chancery Consolidated Orders in Morgan's Equity Practice, that order being substantially the same as Order XXXIII. of the Judicature Act 1875, under which the present application was made.

ARCHIBALD, J.—I do not think any legal claim has been admitted by the defendant. Does equity enforce a gift, unless something has been done in pursuance of it? If the money had been paid, the defendants would probably not be able to recover it. I think before making this order, it is necessary that a *primâ facie* legal or equitable case should be made out by the plaintiff. I will refer the summons to the court.

No. CCLXXXVIII.

Signing judgment on specially indorsed writ—Judicature Act 1875, *Order XIV., rule* 1.

THIS was an appeal from the district registrar of Swansea, who had refused to set aside an order giving defendant leave to appear. The action was on a bill of exchange, and the defendant had obtained leave to appear under the Bills of Exchange Act. The plaintiff's affidavit stated that the consideration for the bill was the withdrawal of an execution against a third party. Defendant's affidavit denied the consideration.

Butterworth for the plaintiff.

Anstie for the defendant.

ARCHIBALD, J.—I think there is too much contradiction and doubt about this matter to allow the plaintiff to sign judgment.

No order. Costs to be defendant's in any event.

No. CCLXXXIX.

DUNCAN *v.* VEREKER.

Amendment of statement of defence—Judicature Act 1875, *Order XXVII., rule* 1.

THIS was an action brought on a voluntary bond, and the defence set up was one of fraud. Master Gordon had ordered paragraphs 3, 4, 5, 6, 7, 8, 10, and part of 12, to be struck out of the statement of defence, and that order was now appealed against.

Solomon for the defendant.—The facts are set out as they would have been in an answer to a bill in Chancery.

Nasmyth for the plaintiff.

ARCHIBALD, J.—It would have been sufficient for the defendant to have set out that there had been cohabitation between the parties, and the false representations which induced the defendant to give the bond without going into all these details. This comes within the words of Order XXVII., rule 1, "any matter which may be scandalous." Matter of this sort is not fit to appear on the pleadings.

Order of master affirmed. Costs of this application to be plaintiff's costs in any event.

Wednesday, Feb. 2.

No. CCXC.

HAWLEY *v.* READE.

Interrogatories—Judicature Act 1875, *Order XXXI., rule* 1.

THIS was an action on a bill of exchange, and the defendant had obtained leave to appear. The defence set up was that the plaintiff was suing for the benefit of the drawer as his nominee, and that there had been a total failure of consideration. The defendant now applied for leave to deliver interrogatories before his statement of defence; the interrogatories went to prove the above defence. The defendant desired to obtain the information at this stage, as it would enable him to see whether the failure of consideration would be a defence to this action.

ARCHIBALD, J.—I think this is a case for allowing interrogatories before the statement of defence. To do so may save expense. If the plaintiff is a holder for value without notice no statement of defence will be put in.

Order that the defendant be at liberty to deliver the interrogatories, and to have further time to deliver his statement of defence until the interrogatories are answered.

No. CCXCI.

MERCANTILE MUTUAL INSURANCE COMPANY *v.* SHOESMITH.

Discovery—Judicature Act 1875, *Order XXXI., rule* 12.

IN this case an application was made for discovery by the defendant. The statement of defence had not been delivered.

ARCHIBALD, J.—I think in all these cases parties may be put to very great expense unnecessarily. The object I have in view is to keep down the costs, which would become enormous now, if no check was to be put upon these applications. When the statement of defence is delivered, unless that shows that discovery cannot possibly be wanted, it will be allowed as a matter of course.

Adjourned till after statement of defence.

No. CCXCII.

PLUM *v.* NORMANTON IRON AND STEAM CO. (LIMITED).

Discovery—Judicature Act 1875, *Order XXXI., rule* 12.

IN this case, an application for discovery by the defendant before delivery of the statement of defence, was adjourned, as above,

ARCHIBALD, J., stating that these unnecessary applications would soon be dismissed with costs.

No. CCXCIII.

BUCHANAN *v.* TAYLOR.

Interrogatories—Judicature Act 1875, *Order XXXI., rule* 5.

THIS was an action for libel, and the plaintiff now applied to strike out interrogatories that had been administered by the defendant. The gist of the alleged libel was that the plaintiff had written anonymous criticisms disparaging the works of other writers of reputation, and praising his own writings. The defence was Not Guilty and justification as fair literary criticism.

MacClymont, for the plaintiff.—The defendant attempts to fill up a general plea of justification by interrogatories. He cannot do that. A plea of justification must state particulars of every act of misconduct that the defendant has charged the plaintiff with: (*Gourley* v. *Plimsoll*, L. Rep. 8 C. P. 560.) The defendant is the proprietor of the periodical in which the libel appeared.

R. Williams, for the defendant.—The plaintiff wrote an article called "The Fleshly School of Poetry," in which he severely criticised the writings of Swinburne, Rosetti, Morris, and others, and

spoke favourably of his own works, under the pseudonym of "Thomas Maitland." He has written us a letter saying that it was owing to a misadventure that the article was signed under the name of "Maitland," During the controversy he wrote a letter to the *Athenæum*, in which he admitted having written under pseudonyms.

ARCHIBALD, J.—The defendant first says that the plaintiff published certain articles, and then seeks to interrogate him as to what articles he has written. That the plaintiff wrote under an assumed name will not justify the defendant in charging him with writing anything that he has not written. The defendant must know that the plaintiff has written the articles upon which he seeks to justify, and not have to interrogate him to discover it. That is fishing for a defence. The defendant might ask, Did you not in certain papers write such and such articles? but not what articles did you write? Nor can the defendant ask under what circumstances the Fleshly School of Poetry was published with the signature of Thomas Maitland, and as to what was the nature of the misadventure mentioned in the plaintiff's letter, by which the signature of T. Maitland came to be affixed to it. He is only entitled to put particular circumstances to the plaintiff, and to ask him whether it was under those circumstances.

Order to strike out three of the interrogatories.

No. CCXCIV.

GRANT AND ANOTHER *v.* THE BANQUE FRANCO EGYPTIENNE.

Stay of further proceedings—Judicature Act 1875, *Order LVIII., rule* 16.

IN this action a demurrer had been argued, and decided against the defendants, and the plaintiffs were going on to try the issues of fact and to tax the costs of the demurrer.

Foard, for the defendants, now applied for a stay of proceedings, pending an appeal.—The demurrer raises the question whether the defendant being a corporation, the Lord Mayor's Court has jurisdiction. The plaintiffs have declared in prohibition. In consequence of the question having been virtually decided by your Lordship's court we were unable to argue it. The effect of the judgment is that the attachment which the defendants had obtained still exists, but that the writ of prohibition issues, which prevents their acting upon it. 258,000*l.* was in the hands of Grant, and we took the usual proceedings in the Mayor's Court, which operated as a distringas. We are informed that Grant has since parted with this money. We submitted to a judgment on the demurrer simply for the purpose of an appeal.

Anderson, for the plaintiffs.—We deny that Grant has parted with this money. We have got judgment on demurrer, and under

Order LVIII., rule 16, an appeal is no stay unless otherwise ordered; and they have not given us notice under rule 2. We are entitled to have security for the costs of the prohibition up to this time, which will amount to nearly £2000.

ARCHIBALD, J.—The rule formerly was that there could not be more than one judgment in an action; there could not be separate judgments on issues of fact and issues of law. But under the Judicature Act that, no doubt, is altered. It is not now, as it was formerly, considered of great importance to have only one taxation of costs. I shall make the order to stay till after the judgment of the Court of Appeal; and you can apply to the Court of Appeal if you have any ground for asking for security.

Order, all further proceedings therein to be stayed till after the judgment in the Court of Appeal. Costs in the cause.

No. CCXCV.

WILKS AND OTHERS *v.* PARKER.

Demurrer—Judicature Act 1875, *Order XXVIII., rule* 2.

IN this case the defendant had demurred to the plaintiff's statement of claim, and Master Johnson had refused to strike out the demurrer as frivolous. The plaintiff now appealed. The action was for breach of an agreement to pay deposit money.

Cooper, for the plaintiff.—The case of *Pordage* v. *Cole* (1 Wms. Saund. 548) shows clearly that this demurrer is bad. Moreover, under the Judicature Act, this may be treated as a claim for specific performance. Or the money I ask for as due under the agreement may stand as the amount of damages I claim for the breach.

Hall, for the defendant.—By the agreement, 2000*l.*, being part of the purchase-money on the sale an estate, was to be paid by a certain date, and the time of conveyance was fixed at a certain date. The plaintiff is entitled to damages for the breach of the agreement to pay the deposit money; but the statement of claim asks for the 2000*l.* deposit. He could only claim that in an action for specific performance.

ARCHIBALD, J.—The real point is, Is this money due to the plaintiff as a debt? If it is not, the demurrer is good; it is certainly not frivolous.

Appeal dismissed with costs; the plaintiff to have liberty to amend the statement of claim.

Thursday, Feb. 3.

No. CCXCVI.

CADOGAN ADVANCE COMPANY (LIMITED) *v.* SHEPHERD.

Amendment of statement of defence.—Judicature Act 1875, *Order XXVII., rule* 1.

THIS was an action on a promissory note for 90*l.*, given in 1871, and renewed from time to time. The third paragraph of the defendant's statement of defence, claimed by way of counter-claim, and set-off payment of 190*l.* in respect of scrip held by defendant in plaintiffs' company. The Master had refused to strike this out on the ground that it was a good counter-claim; and, if not good, then matter for demurrer. The defendant was the principal shareholder in the plaintiff company, which was now being wound-up voluntarily.

Cooper Wyld, for the defendant.

ARCHIBALD, J.—The holder of scrip may be entitled to shares, but not to money. The defendant must set out enough to show that he has a claim for money against the plaintiffs—shares are not money.

Order paragraph 3 to be amended or excluded. Costs to be costs in the cause.

No. CCXCVII.

DAWES AND ANOTHER *v.* THORNTON AND OTHERS.

Notice to third party—Judicature Act 1875, *Order XVI., rules* 17, 18, 19.

THIS was an action by builders for work done under a contract to build a church. The defendants now desired to serve a third party with notice that they claimed indemnity from him. The nature of the claim for indemnity was that Mr. Barry, the architect, had ordered costly extras, and had no authority to order them, and must, therefore, indemnify the defendants. It was stated that the question would be whether these extras were a reasonable outcome of the contract.

Order made for leave to serve notice on C. Barry.

No. CCXCVIII.

PADWICK *v.* SCOTT.

Transfer of action—Judicature Act 1873, *s.* 24, *sub-s.* 2, *s.* 34.

THIS was an application to transfer an action on a deed to the Chancery division of the Court. The defence was that the deed was in equity void, and should be set aside on the ground of undue influence.

Chitty, for the plaintiff, referred to Judicature Act 1873, s. 24, sub-s. 2.

G. Shaw, for the defendant, referred to s. 34 of the Act of 1873.

ARCHIBALD, J.—This case is assigned to the Chancery division, as it relates to the rectification, setting aside, or cancellation of a deed.

Order to transfer to Chancery division (V.C. Hall).

Friday, Feb. 4.

No. CCXCIX.

WOOLSTON AND ANOTHER *v.* BAINES.

Signing judgment on specially indorsed writ—Judicature Act 1875, *Order XIV., rule* 1.

THIS was an action for money paid at the request of the defendant, for differences on the Stock Exchange. Master Hodgson had refused to make an order to sign judgment, on the ground that there was an arrangement to carry over the account between the parties.

The plaintiffs relied on an admission of the defendant's that the money was due.

ARCHIBALD, J.—How can the agreement between the parties to carry over the account be an answer to this action? It is a mere matter of arrangement, a promise to postpone, for which the defendant cannot suggest any consideration.

Order to sign judgment.

Decision of Master reversed.

Saturday, Feb. 5.

(Before DENMAN, J.)

No. CCC.

LANE *v.* EVE AND ANOTHER.

Swearing the jury for judgment on default of plaintiff.—Judicature Act 1875, *Order XXXVI., rules* 19, 20, 22.

THIS action had been tried before Pollock, B., and on its being called on the plaintiff was absent, and the defendant appeared. The jury was sworn, and a verdict taken for the defendant, the Judge certifying for a special jury. Subsequently the plaintiff applied to set aside the judgment, which was done on the terms that the plaintiff should pay the costs of the day, all costs thrown away, and the costs of the application to tax. The question now arose on appeal from the taxing master, whether the sum of 12*l.* 12*s.* should be allowed the defendant as costs of the special jury.

Clay, for the plaintiff.—It was unnecessary to swear the jury. Under Order XXXVI., rule 19, it is not intended that a verdict should be taken.

Lumley Smith, for the defendant, referred to the words in rule 22 of the same Order, "direct that judgment be entered for any or either party, as he is by law entitled to upon the findings," and doubted whether "judgment dismissing the action" would be a final and conclusive judgment, so as to prevent the plaintiff bringing another action.

DENMAN, J.—I agree that the practice of not swearing the jury is right, but as it was done under a mistake, I think the fair course would be for each party to pay half the costs.

Order by consent for each party to pay 6*l.* 6*s.*, costs in the cause.

No. CCCI.

BERRIDGE *v.* ROBERTS.

Signing judgment on specially indorsed writ—Judicature Act 1875, *Order XIV., rule* 1.

THIS was an application for leave to sign judgment under the above rule on appeal from the master. The action was to recover 5000*l.* and interest, on a joint and several covenant. The defendant set up a deed of release; the answer to that being that the release was an escrow.

Howell, for the plaintiff, asked that if judgment was not allowed to be signed, at all events the defendant might be ordered to pay the money into court.

A. B. Harrison, for the defendant.

DENMAN, J.—This is a question for a jury to try. The plaintiff brings simply an affidavit, stating that the money is due; and the defendant replies by alleging a deed of release. The plaintiff has to resort to the difficult affirmative proof that the deed of release was only delivered as an escrow. I shall not order the money to be paid into court.

No. CCCII.

Transfer of pending business—Counter claim in County Court—Judicature Act 1873, *sect.* 22; *Judicature Act* 1875, *Order XIX., rule* 3.

THIS was an *ex parte* application for leave to proceed under the Judicature Acts in order to file a counter claim. The action was commenced under the old system, and the declaration was for goods bargained and sold, the plea being never indebted. The action was remitted from the Superior to the County Court on Nov. 26. An application was subsequently made to the County Court Judge for leave to file a counter-claim, and he adjourned the action for two months to enable the defendant to apply to a Judge of the Superior Court for leave to proceed under the Judicature Acts. It was stated that the application was made *ex parte* by consent.

DENMAN, J.—There is no proof that the other side consent before me; and the cause has now gone on too long under the old system to transfer it to the new.

No order.

Monday, Feb. 7.

No. CCCIII.

FOWLER *v.* LEE.

Signing judgment on specially indorsed writ—Judicature Act 1875, *Order XIV., rule* 1.

THIS was an appeal from the district registrar of Liverpool, who had refused the plaintiff's application to sign judgment. The action was brought under the old procedure, and the writ specially indorsed in the same manner as it would now be under Order III., rule 6. The special indorsement on the writ was as follows:—"April 1875. To amount of account ren-

dered for work done by the plaintiff for the defendant at his request in and about the keeping and training of a horse of the defendant, £51 5s." Conflicting decisions as to whether judgment could be signed under Order XIV., rule 1, under any circumstances when the writ had been indorsed before the Judicature Acts came into operation were referred to. It was stated that the district registrar had said that any rate he would not make the order after issue joined.

Channell, for the plaintiff.—The general order of Mr. Justice Lush that where no declaration has been delivered before the 1st Nov. the proceedings should be continued under the old system was expressly stated to be subject to special orders. If there is no defence to this action, why should it go to trial? The plaintiff's claim to a set-off is in reality only ground for an action of trover.

W. C. Gully, for the defendant.—My claim to a set-off is in respect of certain harness, &c., left by the defendant with the plaintiff. That might be for goods sold; leaving goods in the possession of another is, under certain circumstances, evidence of a sale. We paid £25 on this claim, and this proceeding was not taken by the plaintiff till after issue joined. Supposing the set-off not to be good, if the plaintiff can avail himself of the new procedure the defendant can also, and my defence is good as a counter-claim. If this action goes on we shall apply to bring it under the Judicature Acts in order to file our counter-claim.

DENMAN, J.—I shall affirm the registrar's decision, and, if both parties consent, I will give the defendant leave now to file his counter-claim.

No order; costs to be defendant's in any event. Defendant to be at liberty to proceed by way of counter-claim.

Paddison, Son, Tetley, solicitors for the defendant.

Owles and *Co.*, for the plaintiff.

No. CCCIV.

MERCANTILE RIVER PLATE *v.* ISAAC.

Substituting a plaintiff—Judicature Act 1875, *Order XVI., rule* 2.

THIS was an action for the balance due on a promissory note brought under the Bills of Exchange Act. The present application, on appeal from Master Manley Smith, was to substitute one Hart as the plaintiff in the action. It appeared that the promissory note had been drawn in favour of Hart, who was a banker;

that Hart, on leaving England, had put the note into the hands of the Mercantile River Plate Bank, but without indorsing it; and that on its falling due, Hart, having been informed that he had omitted to indorse it, forwarded to the River Plate Bank an indorsed copy of the note. It was in consequence of this informality in the note sued upon that it was desired to substitute Hart as plaintiff in the place of the Mercantile River Plate Bank. An objection taken that this action being under the Bills of Exchange Act the new procedure could not be taken advantage of, having been overruled,

DENMAN, J. made the order asked for, reversing the decision of the Master, the substituted plaintiff to pay the costs of both applications.

E. Jones for the substituted plaintiff.

T. Hastings for the defendant.

Solicitors for Hart, *Mackerell* and *Co.*

Solicitors for the defendant, *Austin* and *Co.*

Tuesday, Feb. 8.

No. CCCV.

Substituted service—Judicature Act 1875, *Order IX., rule* 2.

On an application for an order for substituted service of a notice of application for an attachment, an affidavit having been read,

DENMAN, J., said that supposing it to be taken to be proved that the defendant was wilfully evading service, he knew of no power of ordering substituted service except in the case of a writ of summons in an action.

No. CCCVI.

Appearance—Judicature Act 1875, *Order XII., rule* 4.

THIS was an application to set aside an order of Master Unthank giving the defendants time, on the ground that the application should have been made to the District Registrar of Manchester. The action was brought against the North-Western Railway Company to recover damages for personal injuries. The defendants had appeared in the district registry of Manchester, where the writ was issued; the statement of claim had been filed and delivered there on the 18th Jan., and a summons for time had then been taken out by the defendants in the district registry, on

which they obtained an order. While that order was running, a summons was taken out in London by the defendants for seven days further time to plead, on which the order of Master Unthank was made, which it was now sought to set aside. The explanation on the part of the defendants was, that there had been a mistake on the part of their agents in Manchester, and that they had no authority to appear there. After some discussion as to whether the defendants carried on business in Manchester within the meaning of Order XII., rule 3,

DENMAN, J.—The defendants cannot disavow the act of their agent in Manchester. If they wished the proceedings to be carried on in London, the notice under Order XXXV., rules 11, 12, should have been given to the plaintiff. I will let the master's order stand, but making the defendants pay all the costs.

No order; cause to be removed to London, costs of all proceedings in the District Registry after writ, and of this application and that before the master, to be plaintiff's in any event.

No. CCCVII.

PLUM *v.* NORMANTON IRON, &c. COMPANY.

Venue—Judicature Act 1875, *Order XXXVI., rule* 1.

A PLAINTIFF has now an absolute right of fixing the place of trial, subject to the defendant's showing such a preponderance of convenience in trying elsewhere as to oust that right.—*Per* DENMAN, J.

No. CCCVIII.

MAKIN *v.* BARROW.

Injunction—Judicature Act 1873, *s.* 25, *sub-sect.* 8.

IN this case, *Forbes* applied for an interlocutory injunction to restrain the defendant from committing certain trespasses. The application had been originally made *ex parte* to Lindley, J., who refused to make an order; and the plaintiff now proceeded upon summons. The plaintiff's affidavit stated that the defendant had erected buildings on his own land, and in order to support such buildings had subsequently erected five buttresses, which encroached upon the land of the plaintiff; that since the issuing of the writ in this action (14th Jan. 1876) the defendant's carts, containing heavy weights, had passed and repassed over the plaintiff's land, thereby cutting up the said land and covering it with ashes and other refuse.

DENMAN, J.—As to the buttresses there can, of course, be no interlocutory injunction. As to the other alleged trespasses, a

doubt whether a sufficient case of continuing injury is shown for me to grant an injunction. The affidavit seems to me to disclose nothing but what may be compensated by damages.

Forbes.—The plaintiff cannot get damages for any injury since the writ.

On behalf of the defendant it was then stated that he would consent to damages being assessed up to the date of trial.

No order, the defendant consenting that the jury at the trial, if a verdict should be found for the plaintiff, shall assess damages for all injury done to the plaintiff's land up to the date of trial. Costs in the cause.

No. CCCIX.

Ogur *v.* Bradby.

Procedure under Bills of Exchange Act—District Registry—Judicature Act 1875—*Order II., rule* 6; *Order V., rules* 1 *and* 2, *Order XII., rule* 3, *Order XXXV, rule* 4.

This was an action under the Bills of Exchange Act brought in the district registry of Manchester; and the important question was now raised, having been referred by the district registrar to the judge, as to whether an action under the Bills of Exchange Act could be carried on in a district registry. The question is dependent on the construction to be put upon the words of rule 6, Order II.

Bruce for the defendant.—The only provisions for the issue of writs out of a district registry are for the issue of writs in the ordinary form. It was never intended that a defendant should he compelled to appear in a district registry if residing elsewhere. But under the Bills of Exchange Act the whole procedure would have to be altered if the defendant is to have the option of not appearing in the place where the writ is issued. If this action can be brought in a district registry I must go before the district registrar in order to obtain leave to appear. Law Times Judges' Chambers Reports, No. CXLII. (*ante*, p. 63) was referred to.

Arthur Wilson for the plaintiff.—I think the apparent difficulty here is overcome if the exact words of rule 6, Order II. are looked to. The question is, what meaning is to be attached to the words "The procedure under the Bills of Exchange Act?" It is conceivable that that might be read as meaning that the whole procedure in the action was to be the same as it would have been if the Judicature Acts had not been passed, but that interpretation would be extremely inconvenient, and would further be incompatible with a decision of Mr. Justice Lindley, reported in W. N. of Jan. 22, p. 23, allowing a party in an action under the Bills of Exchange Act to take advantage of the provisions of the Judica-

ture Act, for the purpose of joining another defendant. The interpretation that I would suggest was intended to be put on the above words is "the procedure so far as it is governed by the Bills of Exchange Act." This construction of the words would not be at variance with the decision in the case cited by my friend, which has been affirmed by the court. That decision went on the ground that there was an express provision in the Bills of Exchange Act for personal service of the writ. This Act deals also with the form of the writ, and with the obtaining leave to appear, and it is to those provisions that the rule in question applies. As regards matters of procedure not dealt with by the Bills of Exchange Act, an action commenced under that Act should now be carried on under the Judicature Acts, and not under the old practice. The Act in question has been expressly extended to all the County Courts in England. By Order V., rule 1, the plaintiff in any action other than a probate action, may issue a writ out of the district registry. Although this rule makes an express exception it does not in any way except an action under the Bills of Exchange Act. The argument applies with especial force to the district registry of Lancaster. The powers of prothonotaries are kept alive by the Judicature Acts, and they had the power of issuing writs under the Bills of Exchange Act.

DENMAN, J.—If this action can be commenced in a district registry no doubt the defendant will be at liberty to apply to remove the action to London from the district registry under rule 13 of Order XXXV. My own impression is that Mr. Wilson's interpretation of the rule is the correct one; but I shall refer the question to the court.

All proceedings stayed. Costs in the cause.

Solicitor for the plaintiff, *Goldring*.

Solicitors for the defendant, *Pattison, Wigg*, and *Co.*

No. CCCX.

Interrogatories—Judicature Act 1875, *Order XXXI, rule* 5.

THIS was an action on a policy of insurance, the defence being a general denial and an allegation of unseaworthiness. The defendant was an underwriter who had accepted an assignment of the policy. The present application was to strike out interrogatories delivered by the plaintiff to the defendant. In support of the application it was argued that the interrogatories were simply the whole statement of claim put into interrogative form; that, as the defendant was only assignee of the policy, he could only say in answer that he knew nothing of the matters interrogated upon; and that he had denied the allegations in the statement of claim only with the object of putting the plaintiff to strict proof of them.

DENMAN, J.—If the defendant denies the facts which the plaintiff alleges, the plaintiff has a right to interrogate him as to them. If the defendant is able to swear truly that he knows nothing about the matters in question, that would be clearly a sufficient answer.

No order.

No. CCCXI.

Signing judgment on writ specially indorsed—Judicature Act 1875, *Order XIV., rule* 1.

THIS was an application to sign final judgment in an action on a guarantee on appeal from Master Pollock.

The defendant's affidavit stated that the guarantee was given in respect of an undelivered bill of costs; that it was given under protest, and obtained by undue pressure; and that the promise was gratuitous.

DENMAN, J.—That the defendant should not have given this guarantee is no defence to the action. Consideration appears on the face of the guarantee, that consideration being the giving up of a lease. It would be cruelty to the defendant to allow this action to go on.

Order.

No. CCCXII.

Wednesday, Feb. 9.

SCHOMBERG *v.* ZOEBELLI.

Particulars of claim—Judicature Act 1875, *Order XXI., rule* 4.

THIS was an application for further and better particulars of claim in an action where the writ was specially indorsed, and the plaintiff had delivered a notice that his claim was as on writ instead of a statement.

In support of the application it was stated that the plaintiff made a large claim for interest at 12 per cent.; that, as regarded the interest, the defendant disputed the claim. The defendant also desired to set up a claim for damages in respect of caps sent to the plaintiff, a merchant at Singapore, to be sold for the defendant, which caps had been transmitted by the plaintiff without any authority to Hong Kong, where, having been spoilt on the voyage, they were sold at a loss.

DENMAN, J.—The form of the summons should not have been for particulars, but for further statement of claim. What the defendant really wants is not particulars of the pleadings, but that it should appear on the pleadings what is his case and what is the plaintiff's. I think this is a case where it will be better to have a statement of claim.

Order for further statement of claim.

No. CCCXIII.

WINGARD *v.* COX.

Particulars of statement of claim.

THIS was an action for slander, and the defendant now applied for an account of the names and addresses of divers persons mentioned in the statement of claim, and in what respects the plaintiff's business was falling off.

DENMAN, J.—The defendant is asking the plaintiff for the names of persons who were passing in the street at the time of the alleged slander being uttered; that can certainly not be allowed. To ask for particulars of damages in an action for slander is a very novel application; and to ask for the particulars of damages occasioned by the business falling off is only another way of asking what business the plaintiff did before the slander. It is very doubtful whether the plaintiff would be allowed at the trial to give particular evidence of damages occasioned by the falling off of his business,

Dismissed with costs.

Solicitor for the plaintiff, *Cooke.*

Solicitor for the defendant, *Froggart.*

No. CCCXIV.

Transfer of action—Amendment of claim—Judicature Act 1873, *s.* 34; *Judicature Act* 1875, *Order XXVII., rule* 1.

THIS was an action brought under the following circumstances: The plaintiff had been, in the year 1849, seduced by the defendant, and by him had become the mother of six illegitimate children. In consideration of the plaintiff's taking charge of the children, the defendant promised to pay her 4500*l.* on the sale of an estate belonging to him, or 300*l.* a year by quarterly payments. An action had been brought and judgment recovered by the plaintiff for quarterly payments then in arrear. Subsequent payments not having been paid on their falling due, the present action was commenced, but the defendant having now sold his estate, and a Chancery suit in respect of the sale having terminated, the plaintiff now claimed, in the alternative, either to recover the payments in arrear or to be paid the sum of 4500*l.*, or the investment of such sum in the name of trustees for her benefit.

A. Charles for the defendant now applied for an order that the claim should be amended, or that the action should be transferred to the Chancery division. This claim is embarrassing, as I can-

not tell whether the plaintiff requires the investment of a lump sum in the name of trustees, or payment of the arrears of the annuity. The plaintiff claims execution of a trust, and that is peremptorily assigned to the Chancery division.

J. C. Mathew for the plaintiff.

DENMAN, J.—The plaintiff does not pray for the execution but for the creation of a trust; what she asks for is often done by a jury.

No order.

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